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# The Law Commission

Working Paper No. 104

## Criminal Law
## Conspiracy to Defraud

LONDON
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This consultative document, completed for publication on 30 October 1987, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission. The Law Commission would be grateful for comments on the consultative document before 30 June 1988.

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Working Paper No. 104

## Criminal Law
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*First Published 1987*

ISBN 0 11 730186 8

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CONSPIRACY TO DEFRAUD

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THE LAW COMMISSION

WORKING PAPER NO.104

# CONSPIRACY TO DEFRAUD


## SUMMARY

In this working paper, the Law Commission examines the common law offence of conspiracy to defraud. This offence was preserved in 1977, as an exception to the replacement of common law conspiracy by a statutory offence of conspiracy, pending a review of it to see what gaps would be left by its abolition. Accordingly, the paper compares the wide scope of conspiracy to defraud, which is enormously broad, with other existing statutory offences relating to fraud and theft. It finds that, while the gaps in the law would be relatively small, its abolition would have a greater impact in practice because of the procedural and other advantages of being able to charge the offence, particularly in large-scale fraud cases. The Commission asks whether conspiracy to defraud should for this reason be retained, or whether, as originally proposed, it should be abolished. A range of options for replacing the common law offence is considered. Views are invited on all the options put forward.

THE LAW COMMISSION

WORKING PAPER NO.104

CRIMINAL LAW

CONSPIRACY TO DEFRAUD

## PART I

## INTRODUCTION

1.1 In this paper we examine conspiracy to defraud, which remains a common law offence, and canvass a number of options for its reform.

### Background to the paper

1.2 There is no general offence of fraud as such in English law. Conspiracy to defraud comes close to being such an offence since, as the House of Lords confirmed in Scott v. Metropolitan Police Commissioner[1] in 1974, it is extremely wide in scope. However, as its name indicates, it cannot be committed by one person acting on his own.

1.3 In 1977, following the earlier recommendations of the Law Commission,[2] Parliament enacted a statutory offence of conspiracy to replace the common law offence of conspiracy.[3] In doing so, it embodied the general principle, widely supported on consultation, that conduct

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1. [1975] A.C. 819; see further para. 2.1, below.

2. Conspiracy and Criminal Law Reform (1976), Law Com. No. 76, Part I.

3. Criminal Law Act 1977, s. 1.

should not be criminal merely because two or more persons agree to perform it. Conspiracy was only to be an offence if the object of the agreement would necessarily amount to or involve the commission of a criminal offence. Conspiracy to defraud was retained as an exception to this general principle because no firm proposals had at the time been put forward for anything to be put in its place.[4] To have abolished conspiracy to defraud without any statutory replacement would have left an unacceptable gap in the law. Parliament compromised, on the recommendation of the Commission and provided, in substance, that although conspiracy to defraud would continue to exist, a person could not be guilty of a conspiracy to defraud if he were guilty of any other offence.[5] That this was the effect of the legislation was confirmed in 1984 by the decision of the House of Lords in the case of Ayres.[6]

1.4 Subsequent experience of prosecutions involving large-scale frauds showed that this restriction on the use of charges of conspiracy to defraud gave rise to considerable difficulties and to injustice in some cases.[7]

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4. Law Com. No. 76, para. 1.16. See further para. 1.7, below.

5. Criminal Law Act 1977, s. 5(2). This provided that "Subsection (1) above [abolishing the offence of conspiracy at common law] shall not affect the offence of conspiracy at common law so far as relates to conspiracy to defraud, and section 1 above shall not apply in any case where the agreement in question amounts to a conspiracy to defraud at common law."

6. [1984] A.C. 447. "The phrase 'conspiracy to defraud' in section 5(2) of the [Criminal Law] Act [1977] must be construed as limited to an agreement which, if carried into effect, would not necessarily involve the commission of any substantive criminal offence by any of the conspirators": per Lord Bridge at p. 459.

7. In Cooke [1986] A.C. 909, Lord Bridge recognised (at p. 918) the need to "modify the language" he had used in Ayres to avoid some of the difficulties which that decision had caused. The House of Lords held that, where it could be shown that there had been an agreed

As one submission to the Roskill Committee put it, Ayres created the risk of a "build-up of a case history of thwarted or inappropriate prosecutions for major frauds".[8] Following an urgent review by the Criminal Law Revision Committee last year,[9] Parliament has now reversed its earlier decision, as confirmed in Ayres, and provided that conspiracy to defraud can be charged in cases albeit that some other offence was committed.[10] This solution to the problem was seen by the Committee as the best that could be devised in the circumstances but one which would not necessarily be permanent.

Is there a need for further reform?

1.5 Although Parliament has resolved the problems created by the Criminal Law Act 1977 so far as bringing prosecutions for conspiracy to defraud is concerned, a number of conceptual difficulties remain. Is it right that there should be a common law offence which is so wide that it embraces almost every offence in the Theft Acts, provided that the defendant has conspired with another to carry out the conduct in question? If it is right, would it not be better to set out the offence clearly in a statute and abolish those offences with which it at present overlaps? What of the principle that conduct should not be criminal merely because more than one person is involved? It is the purpose of this paper to examine these and related issues.

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7. Continued
course of fraudulent conduct going beyond an agreement to commit specific offences, it was legitimate to charge either conspiracy to defraud on its own or both conspiracy to defraud and a statutory conspiracy to commit the specific offences.

8. Report of the Fraud Trials Committee (1986), para. 3.11.

9. Eighteenth Report, Conspiracy to Defraud (1986), Cmnd. 9873.

10. Criminal Justice Act 1987, s. 12.

1.6 There are a number of conflicting principles which bedevil the question of reform in this field. Not only should those who commit fraud be prosecuted and adequately punished, but the law should be such as, in a practical sense, to make their prosecution possible. On the other hand, the scope of any new offences enacted in place of conspiracy to defraud should be limited. At the same time, any overlap with other offences should be reduced to a minimum.

1.7 This is our second working paper on this subject: the first, Working Paper No. 56, Conspiracy to Defraud, was published in 1974. This was one of a series of five working papers published by the Commission in that and the following year which had examined different areas of the law of conspiracy with a view to identifying and, where necessary, filling gaps which a limitation of the offence of conspiracy to agreements to commit a substantive criminal offence would leave. It had been the Commission's intention to follow up the proposals in that paper with final recommendations, but progress was held up by the need to complete work on other projects and for other reasons. There have been a number of substantial changes and developments in the law since then which means that many of the original proposals require reconsideration. More importantly, however, it has since become evident that in formulating those proposals insufficient weight was given to the procedural and other advantages in being able to charge conspiracy to defraud which must now be taken into account if a satisfactory reform of the law in this field is to be achieved. In the light of these matters we decided to initiate further consultation. This working paper therefore supersedes the earlier paper, but we make reference to it at several points.

Structure and scope of the paper

1.8 In Part II we describe the scope of the common law offence. In Part III, after drawing attention to some of the problems encountered during the passage of the Theft Acts 1968 and 1978 which have an important bearing on the subject of this paper, we outline the scope of the main statutory offences relating to fraud. In Part IV we identify the gaps which would arise in the criminal law from the abolition of the common law offence. In Part V we consider the objections in principle to conspiracy to defraud and in the next part, Part VI, we examine the procedural and other advantages of being able to charge the offence. We summarise in Part VII the possible options for reform, which are then considered separately in Parts VIII to XII. Part XIII contains a consideration of the question of temporary deprivation, in relation to existing and possible offences. Finally, in Part XIV, we summarise the main points for consultation.

1.9 For reasons which are explained at paragraph 2.5, the paper does not deal with the territorial jurisdiction of either conspiracy to defraud or the possible offences which might be put in its place.

1.10 It will be seen that our consideration of conspiracy to defraud and some of the options we put forward for its replacement raise issues which run throughout the law relating to offences involving dishonesty, in particular the offences contained in the Theft Acts. We thought it right to raise them here, although we appreciate that some may say that these issues would be better looked at in the context of a review of the Theft Acts as a whole. In making the recommendations which led to the passing of the Theft Act 1968, the Criminal Law Revision Committee aimed to provide a simpler and more effective scheme of offences in place of the old law. That Act has now been in operation

for almost twenty years and during that period there have been many decisions of the courts explaining the effect of its provisions. Some of these decisions have led commentators and others to argue that the intended aim has only partly been met. It has also been said that the creation of five further offences in the Theft Act 1978 in place of the offence in section 16(2)(a) of the 1968 Act has added unnecessary complexity to the law. While the time may be approaching when a thorough review of the Theft Acts is required, this is a question which falls outside the scope of the present exercise.

1.11 To complete this summary of the attempts since 1959 to produce a simpler and more logical law of conspiracy to defraud, it should be added that Parliament has on two occasions been asked to consider the need for a more broadly defined offence of fraud and on both occasions has after extensive debate stepped back from enacting one by the narrowest of margins.[11] In the light of this history and of the opinion expressed by the Criminal Law Revision Committee that the ideal solution would be for proposals to be brought before Parliament which would enable the common law offence to be abolished and replaced either by a series of substantive offences or a wide residual offence of fraud,[12] we have felt it essential to try to expose all the many difficulties which underlie reform in this area.

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11. See further paras. 3.2 - 3.8, below.

12. Eighteenth Report, para. 4.1.

## PART II

## SCOPE OF CONSPIRACY TO DEFRAUD

### A. Definitions of the offence

2.1 The decision of the House of Lords in 1974 in Scott v. Metropolitan Police Commissioner[1] provides the source of the generally accepted definitions of conspiracy to defraud. In that case, the defendant admitted bribing cinema employees to abstract films for the purpose of making illegal copies and he was charged with others with conspiracy to defraud the owners of the copyright and distribution rights. It was argued that a person could not be defrauded unless he was deceived. Viscount Dilhorne (with whose speech the other Lords agreed) rejected the argument, holding that deception was not an essential ingredient of fraud.[2] He said:[3]

> "...in my opinion it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."

Lord Diplock added:[4]

> "Where the intended victim of a 'conspiracy to defraud' is a private individual the purpose of the conspirators must be to cause the victim economic loss by depriving

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1. [1975] A.C. 819.

2. The well-known dicta of Buckley J. in Re London and Globe Finance Corporation [1903] 1 Ch. 728, at 732 and 733, that "to defraud is by deceit to induce a course of action" was held not to be exhaustive: ibid., at p.836.

3. Ibid., at p.840.

4. Ibid., at p.841.

him of some property or right corporeal or incorporeal, to which he is or would or might become entitled. The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough."

2.2 These definitions, which were not intended to be exhaustive, do not cover an agreement where the purpose is by dishonesty to cause a public official to act contrary to his public duty, which also amounts to a conspiracy to defraud at common law. Lord Diplock in the same case said:[5]

> "Where the intended victim of a 'conspiracy to defraud' is a person performing public duties as distinct from a private individual it is sufficient if the purpose is to cause him to act contrary to his public duty, and the intended means of achieving this purpose are dishonest. The purpose need not involve causing economic loss to anyone."

2.3 Scott therefore shows the wide scope of the offence of conspiracy to defraud and confirms that it extends to conduct which would not amount to an offence if committed by a single individual. It is these outer limits of the common law offence which we shall be examining in detail in Part IV.

## B. Dishonesty

2.4 "Dishonesty" has been held to be an essential ingredient of conspiracy to defraud at common law.[6] After some confusion as to what was the proper approach to the test of dishonesty in the offences of which it is an ingredient, the Court of Appeal in Ghosh[7] ruled that the test of dishonesty was the same in conspiracy to defraud as

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5. Ibid.

6. R v. Landy (1981) 72 Cr.App.R. 237, 247.

7. [1982] Q.B. 1053.

in theft and in obtaining property by deception.[8] Under the "Ghosh" test the jury must decide, first, whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not, the prosecution fails. Second, if it was dishonest, they must decide whether the defendant himself must have realised that what he was doing was by those standards dishonest. The test is therefore objective, in the sense that it is the generally accepted standards which are to be applied, and also subjective, in the sense that the defendant must realise that his conduct is dishonest on an objective test. In most cases, however, the defendant's awareness of how other people would regard his conduct will not be in issue.

C. Territorial jurisdiction

2.5 By section 1(4) of the Criminal Law Act 1977, the offence of statutory conspiracy must be founded on a contemplated substantive offence which would be triable in England and Wales. This codifies the principle laid down by the House of Lords in Board of Trade v. Owen,[9] which continues to govern conspiracy to defraud. In that case a conspiracy was entered into in England to defraud an export control department in West Germany by causing the department to export certain metals from Germany by means of fraudulent representations as to their intended destination. It was held that the English courts had no jurisdiction. Although the conspiracy was not to commit a crime but rather to

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8. For the purpose of offences involving theft, s.2 of the Theft Act 1968 provides a partial, negative definition of dishonesty: paraphrasing that section, a person is not to be regarded as dishonest, if he appropriates property in the belief that he has in law the right to deprive the other of it; or if he does so in the belief that he would have the other's consent if the other knew of it; or if he does so in the belief that the person to whom the property belongs cannot be found.

9. [1957] A.C. 602.

attain a lawful object by unlawful means, no indictment lay in this country, because the unlawful means and the object were outside the jurisdiction.

2.6 The principle laid down in Owen was applied in Attorney General's Reference (No. 1 of 1982)[10] in which the Court of Appeal held in relation to conspiracy to defraud that where the "true object" of the conspiracy is to be carried out abroad, it is not indictable here merely because its performance abroad would either cause economic damage to the proprietary interests of a company within the jurisdiction or injure a person or company here by causing him or it damage abroad. The Lord Chief Justice considered,[11] but rejected, a further argument, based on a dictum of Lord Tucker in Owen[12] that a conspiracy to defraud which would cause injury to a person or company within the jurisdiction is indictable here. He did so on two alternative grounds. First, if the proposition were limited to conspiracies entered into in this country, technical anomalies might arise. Second, if the limitation to conspiracies entered into here were removed, the new test would be "immensely wide".

2.7 The general question of the jurisdiction of the English courts over offences of fraud which are in some way connected with a foreign jurisdiction is a complex one. The rules which are applied for the purpose of determining whether a crime with a foreign element was committed within the jurisdiction of an English court are narrow, technical and insular in character. They sometimes call for detailed investigation of the facts of a particular case for the purpose of resolving the issue of jurisdiction; and they

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10. [1983] Q.B. 751.

11. Ibid., p.758.

12. [1957] A.C. 602, 634.

were evolved before the introduction of modern electronic methods of communication and of transferring money across national boundaries. Since the question of jurisdiction is a problem which affects fraud offences in general, both substantive and inchoate, we believe that it would be undesirable for it to be considered merely in relation to conspiracy to defraud. Accordingly, we do not include consideration of the jurisdictional extent of the common law offence in this paper. However, we are giving further thought in a separate context to ways in which the present jurisdictional rules for offences of fraud might be rationalised and updated.[13]

D. Mode of trial and penalty

2.8 Conspiracy to defraud is triable only on indictment. By section 12(3) of the Criminal Justice Act 1987, the offence now has a maximum penalty of ten years.[14] The penalty had previously been at large and the Criminal Law Revision Committee recommended that it should remain so.[15] However, the Criminal Law Act 1977[16] established the general principle that the maximum penalty for conspiracy should be no greater than that for the substantive offence (or the most serious of the substantive offences) in question. It was thought that, by bringing the penalty into line with the maximum penalty for theft and obtaining

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13. The Roskill Committee drew attention to problems in this area and expressed the hope that these matters would be considered by the Commission or other appropriate body: Report of the Fraud Trials Committee (1986), para. 3.17.

14. The offence is therefore arrestable. It was made arrestable only as recently as 1986 by s.24(1) of the Police and Criminal Evidence Act 1984.

15. Eighteenth Report, Conspiracy to Defraud (1986), Cmnd. 9873, para. 4.8.

16. Sect. 3.

property by deception, the courts would have sufficient powers to deal with the most serious cases.

## E. Prosecution guidance

2.9 The Criminal Law Revision Committee accompanied its recommendation that the common law offence be restored to its full ambit with a further recommendation[17] that, as a safeguard for defendants, it would be appropriate for the Director of Public Prosecutions to embody in the Code for Crown Prosecutors[18] guidelines in general terms as to the circumstances in which it would be appropriate to prefer a charge of conspiracy to defraud as opposed to substantive offences. The following guidance has been issued by the Director which will in due course be embodied in a revised Code:

> ".... When any substantive offences are no more than steps in the achievement of a dishonest objective it is open to Crown Prosecutors to concentrate upon that objective and to charge a single count of conspiracy to defraud. It may sometimes be appropriate to charge conspiracy to defraud where the object of the exercise was to swindle a large number of people and a conspiracy to commit a substantive offence is not appropriate and does not meet the justice of the case. Where, however, the essence of the offence is not really fraud at all, as in theft from shops or robbery, it would be wrong to charge conspiracy to defraud relying upon the wide category of offences which loosely include an element of fraud.
>
> "...It will not normally be appropriate to use [the offence] in relation to minor criminal conduct. Crown Prosecutors should always exercise care to ensure that the offence is commensurate with the gravity of the charge."

2.10 As the Criminal Law Revision Committee also envisaged,[19] the Director points out in his guidance that

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17. Eighteenth Report, paras. 4.4-4.6.

18. Under s.10 of the Prosecution of Offences Act 1985.

19. Eighteenth Report, para. 4.7.

trial judges may be expected to intervene to prevent injustices which might otherwise occur. If it becomes apparent, for example, during the course of a trial that the conspiracy to defraud alleged in the indictment could be put more straightforwardly to the jury as a case of obtaining by deception, it may be expected that the judge would direct the prosecution to follow that course. The judge can also withdraw from the jury a charge of conspiracy to defraud where he considers it to be oppressive.

## F. Statistics

2.11 Appendix D contains a table showing the number of persons sent for trial for fraud offences in the Crown Court from 1982 to 1985. The fraud offence which is most frequently resorted to is obtaining property by deception contrary to section 15 of the Theft Act 1968: in 1985, for example, 4083 out of 5320 (77%) defendants sent for trial in the Crown Court involving fraud offences had been charged with that offence. Conspiracy to defraud was the next most frequently used charge. Here, however, the effect of the decision in Ayres[20] is reflected in the table. Whereas in 1983, 956 persons were sent for trial for conspiracy to defraud, by 1985 the equivalent figure was 223. There was a more or less corresponding increase in the number of those who were sent for trial on charges of obtaining property by deception.

2.12 So far as the length and type of sentences are concerned, the figures are not separately recorded in the Criminal Statistics for each offence. However, figures were obtained from the Home Office for 1982, which showed that of the 705 defendants who were found guilty of conspiracy to defraud, 329 were given a sentence of immediate custody, 223 a fully suspended sentence and 153 were otherwise dealt with.

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20. [1984] A.C. 447; see paras. 1.3-1.4, above.

## PART III

## OUTLINE OF THE PRESENT SCHEME OF OFFENCES AND ITS DEVELOPMENT

3.1 We do not intend to burden this paper with a detailed statement of the present law relating to offences, apart from conspiracy to defraud, involving dishonesty. There are several well established textbooks on this subject,[1] and any attempt to rival these would therefore be a wasted effort on our part. Rather, our more limited aim is to outline the basic scheme of the statutory offences in this field. However, we begin by mentioning some of the salient points which emerged from the passage of the reforms which led to the enactment of the Theft Acts 1968 and 1978; these need to be borne in mind when considering the reform of conspiracy to defraud.

### A. Reform of theft and related offences

#### 1. Eighth Report of the Criminal Law Revision Committee and the Theft Act 1968

3.2 In March 1959, the then Home Secretary asked the Criminal Law Revision Committee -

> "to consider, with a view to providing a simpler and more effective system of law, what alterations in the criminal law are desirable with reference to larceny and kindred offences and to such other acts involving fraud or dishonesty as, in the opinion of the committee, could conveniently be dealt with in legislation giving effect to the committee's recommendations on the law of larceny."

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1. See, for example, Smith, The Law of Theft (5th ed., 1984); Griew, The Theft Acts 1968 and 1978 (5th ed., 1986); Arlidge and Parry, Fraud (1985); Archbold, Criminal Pleading, Evidence and Practice (42nd ed., 1985), esp. paras. 18-1 et seq.

The Committee's Eighth Report[2] was published in May 1966 and much of what the Committee recommended is embodied in the Theft Act 1968. It recommended various specific fraud offences including, in particular, a scheme of three offences relating to criminal deception. The first offence was intended to replace the offence of obtaining by false pretences[3] and is now contained in section 15 which covers obtaining property by deception. The second offence was intended to reproduce the offence of obtaining credit by fraud but with several alterations intended to widen the scope of the old offence. The third offence, contained in clause 12(3) of the draft Theft Bill, was intended to provide for relatively minor cases not falling within the first or second offences or the offence of procuring by deception the execution of a valuable security.[4] This offence was to penalise-

> "a person who, dishonestly, with a view to gain for himself or another, by any deception induces a person to do or refrain from doing any act"

and was to be punishable with a maximum of two years' imprisonment.

3.3 The Committee was strongly divided on the question whether there should be a general deception offence of this kind.[5] Clause 12(3) represented a compromise between two radically different proposals put forward for dealing with criminal deception. The first was that there should be a general offence of criminal deception, with a maximum penalty of seven years' imprisonment, which would cover all

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2. Theft and Related Offences (1966), Cmnd. 2977.

3. Larceny Act 1916, s.32(1).

4. See now Theft Act 1968, s.20(2).

5. Op. cit., paras. 96-100.

or nearly all the kinds of deception which should be punishable. The essence of the offence would have been dishonestly using deception for the purpose of gain. The second proposal was not to create a general offence at all because "the terms of clause 12(3) are extremely general, whereas it is a principle of English law to give reasonably precise guidance as to what kinds of conduct are criminal". Furthermore, it would cover "many minor cases of deception of various descriptions which public opinion has not regarded...as requiring the application of the criminal law to them". Another objection was that there would be "a complete overlapping (save for the penalties) with the other two offences under clause 12".

3.4 When the Theft Bill was before the House of Lords, clause 15(3) (as clause 12(3) had by then become) was rejected.[6] In the view of Viscount Dilhorne and Lord Wilberforce, the principal speakers against it, the clause represented an uneasy and undesirable compromise. The offence overlapped with others and it was felt that it would cover matter which should not be treated as criminal. In consequence of this rejection, further amendments were carried out to the Bill. Section 16 (obtaining a pecuniary advantage by deception) was enacted in place of the second and third offences originally proposed (alongside the first offence contained in section 15) and covered the obtaining of credit by deception together with parts of the rejected general offence which it was thought ought to be retained.[7]

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6. Hansard (H.L.), 12 March 1968, vol. 290, cols. 157-174. The voting was 42 to 37.

7. The first draft of the new clause did not give an exhaustive definition of "pecuniary advantage" because it was the Government's intention that the clause should apply to every case of obtaining a pecuniary advantage which ought to be punishable. This was later changed to limit the offence to the circumstances described in paragraphs (a), (b) and (c) of s.16(2). It was argued that those paragraphs covered all the forms of obtaining a pecuniary advantage by deception which ought to be made criminal and that the earlier version, extending as

3.5 We pause here to note that some six years later the House of Lords in its judicial capacity in Scott[8] confirmed the existence of a crime (conspiracy to defraud) which could only be committed by two or more but which, if it were possible for one to commit it, would have been wider than the offence in clause 15(3) rejected by the House of Lords in its legislative capacity in 1968.

## 2. Thirteenth Report of the Criminal Law Revision Committee and the Theft Act 1978

3.6 Section 16 of the 1968 Act did not remain in its original form for long because of the difficulties of interpretation to which the provisions in subsection (2)(a) had given rise.[9] That section was referred to the Criminal Law Revision Committee who in their Thirteenth Report[10] in 1977 made proposals for amending legislation to replace section 16(2)(a). The Committee said that it wished to reserve to our own review of conspiracy to defraud some of the more fundamental criticisms which it had received relating to the deception offences in the Theft Act 1968.[11] Clause 1 of the Committee's draft Bill provided for an offence of dishonestly inducing another by deception to act on any person's promise of payment. It was intended to penalise the obtaining by deception of services on which a

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7. Continued
it did to "any pecuniary advantage", would have introduced undesirable uncertainty into the law. A detailed history of s.16 of the Theft Act 1968 is given in Appendix 2 of the C.L.R.C.'s Thirteenth Report: see n.10, below and text.

8. [1975] A.C. 819; see para. 2.1, above.

9. For example, in Royle [1971] 1 W.L.R. 1764 at 1767, Edmund Davies L.J. said that the section had created a "judicial nightmare".

10. Section 16 of the Theft Act 1968 (1977), Cmnd. 6733.

11. Ibid., para. 3.

monetary value is placed as well as the obtaining by deception of credit in respect of the payment of money.[12] The Committee wished to avoid using the terms "credit" and "services" in the drafting of the offence. In respect of the latter term they thought that it would result in an offence which was not materially different from clause 15(3) which, as we have seen, only a few years earlier had proved to be unacceptable to Parliament.[13] Clause 1 was criticised in the House of Lords as being too complex and a new clause was substituted penalising the obtaining of services by deception.[14] Before the Bill reached the House of Commons, the substituted clause was referred back to the Criminal Law Revision Committee who put forward a revised version of it which was subsequently enacted as section 1 of the Theft Act 1978.[15] This version ensured that the offence, albeit widely defined, would be limited to an obtaining of services "on which a monetary value is placed".

3.7 Section 2 of the 1978 Act created three new deception offences concerned with the obtaining of relief from an existing liability as well as obtaining an exemption or abatement of liability to make a payment. Section 3 penalises the making off without payment in situations where payment on the spot is required. Save in relation to the penalty for the last offence, sections 2 and 3 are identical to the Committee's recommendations.[16]

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12. Ibid., para. 9.

13. Ibid., para. 7.

14. Hansard (H.C.), 31 January 1978, vol. 388, cols. 674-690; 23 February 1978, vol. 389, cols. 234-262.

15. Hansard (H.C.), Standing Committee D, 27 June 1978, cols. 3-11 and 25.

16. An attempt was made to simplify clause 2 and to leave out the requirement of "an intent to make permanent default" where there is a dishonest inducing of a creditor to wait for or forgo payment, but the original clause was restored in the House of Commons: see Hansard (H.L.), 23 February 1978, vol. 389, cols. 263-276;

3.8 This summary of the circumstances leading to the enactment of the two Theft Acts illustrates some of the problems which have beset earlier efforts to reform the substantive law relating to fraud. It also throws some light on the complexity and multiplicity of offences in this area. The next section will attempt to outline the scope of the present scheme.

## B. The scheme of the Theft Acts

3.9 The majority of situations in which conspiracy to defraud can now be charged will involve a conspiracy to commit one or other of the offences under the Theft Acts 1968 and 1978. The basic scheme of the Theft Acts can be summarised as requiring "dishonesty"[17] together with -

(a) an appropriation of property belonging to another with the intention of permanently depriving the other of it. This is the basic definition of theft.[18] It also forms the basis for the offences of robbery and burglary: these offences require a dishonest appropriation, but they also involve other elements not related to this, such as the use of force and entering as a trespasser. They are, therefore, rather special offences and are not included in the discussions in the rest of this paper; or

(b) an obtaining by deception of property belonging to another with the intention of permanently depriving

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16. Continued
(H.C.), Standing Committee D, 27 June 1978, cols. 11-26; and (H.L.), 12 July 1978, vol. 394, cols. 1649-1651. See further paras. 13.10 et seq., below.

17. See para. 2.4, above.

18. Theft Act 1968, s.1(1).

the other of it,[19] or of a pecuniary advantage,[20] or of services,[21] or procuring the execution of a valuable security,[22] or the evasion of a liability.[23] Collectively these are the offences of criminal deception; or

(c) certain more specifically defined conduct not involving (or not always involving) either an "appropriation" or an "obtaining" of one of the specified benefits "by deception".

3.10 The creation of the more specific offences by the Theft Acts shows, implicitly, a recognition that the main group of offences of theft and criminal deception does not cover all the behaviour we might wish to label "criminally dishonest". (By this term we mean proscribed behaviour which would be regarded as dishonest by reasonable and honest people whether or not the definition of the offence includes a requirement that the defendant should have acted dishonestly: blackmail and taking a motor vehicle without authority are two examples.) Dishonest behaviour which may be thought to deserve criminal sanction may fall outside the scope of the main offences either because it does not involve an "appropriation" or a "deception" or because other requirements in the definitions of the main offences are not satisfied.

3.11 Where an agreement to carry out conduct can be prosecuted as conspiracy to defraud and the conduct itself -

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19. Ibid., s.15.

20. Ibid., s.16.

21. Theft Act 1978, s.1.

22. Theft Act 1968, s.20(2).

23. Theft Act 1978, s.2.

(i) is not, prima facie, penalised as theft or an offence of criminal deception, or

(ii) is not penalised by the more specific offences created by the Theft Acts, or

(iii) by specific offences in statutes other than the Theft Acts, or

(iv) cannot be penalised as theft or an offence of criminal deception (or under one of the more specific offences) by interpretation of the concepts involved,

the abolition of conspiracy to defraud would leave an opening for fraud. As in our previous working paper we propose to refer to these openings as "gaps in the law". Offences falling within the first category have been described. Those falling within (ii) to (iv) are now outlined.

## C. Conduct not amounting to theft or deception but penalised by more specific offences in the Theft Acts

3.12 The Theft Acts 1968 and 1978 create several offences which are directed at more specific types of misconduct than the main group of offences of theft and criminal deception. These include:

### (a) Making off without payment (section 3 of the Theft Act 1978)

3.13 This offence was created, following recommendations of the Criminal Law Revision Committee, to cover what had become a clear omission from the scheme of the Theft Act

1968.[24] Where, for example, a person enters a restaurant and orders a meal intending to pay for it but, when he has eaten, changes his mind and leaves without paying there is no appropriation and there is not necessarily any deception. The offence of "making off without payment" covers this omission as it requires neither an appropriation nor a deception; the offence is committed by "a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent [permanently[25]] to avoid payment of the amount due." The maximum penalty on conviction on indictment is two years' imprisonment.

(b) Blackmail (section 21 of the Theft Act 1968)

3.14 The main element of this offence is the making of any unwarranted demand with menaces, with a view to gain or with intent to cause loss. Some cases of blackmail may involve an appropriation[26] but there are difficulties in deciding whether or not this is so. These difficulties are avoided by the provision of an offence which does not require or depend on there having been an appropriation or a deception.

(c) False accounting, suppression etc. of documents (sections 17 and 20(1) of the Theft Act 1968)

3.15 These sections penalise particular manifestations of dishonesty which do not necessarily involve a deception or an appropriation. Section 17 creates two offences,

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24. See Thirteenth Report, Section 16 of the Theft Act 1968 (1977), Cmnd. 6733, paras. 18-21.

25. See R v. Allen [1985] A.C. 1029.

26. See Smith, The Law of Theft (5th ed., 1984), paras. 44-45.

covering the falsifying of accounts and the use of misleading, false or deceptive accounts; in each case there must be proved to be either an intent to gain or to cause loss. Both offences are punishable on conviction on indictment with seven years' imprisonment. The falsifying of accounts may be done in order to conceal the fact that an offence, such as theft, has taken place, but it may be difficult to identify the precise nature of the crime which is being concealed. The falsifying may itself be an integral part of a fraud, for example, an act of preparation for a fraud yet to be carried out. The use of a false or deceptive account may be an attempt to commit another offence involving dishonesty. Section 17 supplements both offences of theft and deception as well as offences of forgery and using a false instrument. Section 20(1) creates an offence of destroying or concealing certain documents, including any valuable security such as a cheque or a share certificate.

(d) Handling stolen goods (section 22 of the Theft Act 1968)

3.16 This offence is committed if (otherwise than in the course of the stealing) a person, knowing or believing goods to be stolen, dishonestly receives the goods or undertakes or assists in their retention, disposal or realisation by or for the benefit of another person or if he arranges to do this. The offence requires neither an appropriation nor a deception but it will often be the case that one who is guilty of handling stolen goods has also appropriated the goods and thus could be charged with theft. However, one who merely arranges with a thief to buy or dispose of stolen goods may not "appropriate" the goods although he could be convicted of handling them.[27]

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27. See Griew, The Theft Acts 1968 and 1978 (5th ed., 1986), paras. 13-40 - 13-41.

(e) Abstracting of electricity (section 13 of the Theft Act 1968)

3.17 Although it might be argued that one who dishonestly uses or causes to be wasted or diverted any electricity assumes the rights of an owner and therefore "appropriates" the electricity, it has been held[28] that electricity is not appropriated by switching on the current. But even if electricity were capable of being appropriated, the abstracting of electricity would not be theft because electricity is not "property" within the meaning of section 4(1)[29] of the Theft Act 1968, and thus is not capable of being stolen or obtained by deception. The offence of abstracting electricity carries a maximum penalty of five years' imprisonment on conviction on indictment.

(f) Taking a motor vehicle or other conveyance without authority (section 12 of the Theft Act 1968)

3.18 This offence is committed by one who, "without having the consent of the owner or other lawful authority, ... takes any conveyance for his own or another's use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in or on it". The maximum penalty is currently a term of three years' imprisonment.[30] Many cases of taking a conveyance without authority will in fact involve an appropriation (although it is arguable that one who merely accepts a ride in a car knowing that it has been taken without the owner's consent does not appropriate the car). For this reason

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28. Low v. Blease [1975] Crim. L.R. 513.

29. Ibid.

30. It is proposed in cl. 32 of the Criminal Justice Bill that the offence should become triable only summarily with a maximum penalty of six months' imprisonment or the statutory maximum fine or both.

charges under section 12 are often accompanied by charges of theft. However, cases of taking a conveyance will often not amount to theft because there will be no (or it will be difficult to prove an) intention permanently to deprive.

(g) Removal of articles from places open to the public (section 11 of the Theft Act 1968)

3.19 This offence, like that of taking a conveyance without authority, covers a specific situation in which there is an appropriation but no intention permanently to deprive. The offence carries a maximum penalty of five years' imprisonment.

## D. Conduct not amounting to theft or deception but penalised by specific offences in statutes other than the Theft Acts

3.20 There are obviously many statutory provisions other than those contained in the Theft Acts which penalise dishonest behaviour not amounting to either theft or an offence of criminal deception. A few of the provisions to which we will be referring later can be given as examples.

(a) Forgery and Counterfeiting Act 1981

3.21 This Act creates several offences, including in particular forgery (section 1), copying a false instrument (section 2) and using a false instrument (section 3) or a copy of a false instrument (section 4): each offence carries a maximum penalty of ten years' imprisonment. These offences do not require proof of deception and can therefore be used in situations where no offence of deception has been committed. Often, however, the offences involve at least an act preparatory to a deception. They all require an intention to induce somebody to accept a false instrument or a copy of a false instrument as a

genuine, or as a copy of a genuine, instrument and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.[31]

(b) Companies Act 1985

3.22 Section 458 of the Companies Act 1985 provides for criminal sanctions against any person who was knowingly a party to "fraudulent trading", that is to say, any business of the company carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose. The section itself does not specifically require either a deception or an appropriation, but deception may feature in cases where fraudulent trading "with intent to defraud creditors" is charged.[32] The scope of this offence will be examined in greater detail in Part X.[33]

(c) Gaming Act 1845

3.23 Section 17 of this Act provides that-

> "Every person who shall, by fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other ... any sum of money or valuable thing ..."

shall be guilty of an offence. The section thus penalises certain gambling frauds without specifically requiring either an appropriation or a deception. The offence can therefore be used, within limits, to penalise gambling

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31. As to the meaning of "prejudice", see further para. 12.11, below.

32. E.g. R v. Grantham [1984] Q.B. 675.

33. See paras. 10.12 et seq., below.

swindles which, because they may not involve an appropriation or a deception, cannot be prosecuted as theft or criminal deception. We examine this offence in greater detail in Appendix B to this paper.

## E. Conduct penalised as theft or an offence of deception (or under one of the more specific offences) by interpretation of the concepts involved

3.24 Some behaviour not at first sight involving all the elements required by the definition of either theft or an offence of criminal deception or another offence has been penalised because the courts have shown that they are willing, in certain circumstances, to interpret the concepts involved in the definition of the offence in a certain way. This means that conduct which was once thought only capable of being penalised by conspiracy to defraud is covered by specific offences. One example relates to the element of deception and its manner of interpretation by the House of Lords in two cases. Charles[34] and Lambie[35] involved (respectively) the use of a cheque or credit card without the authority of the bank or credit card company. In each case the person who had accepted payment by cheque or credit card gave evidence to the effect that they did not care

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34. Metropolitan Police Commissioner v. Charles [1977] A.C. 177. The defendant drew 25 cheques for £30 each by way of payment for gaming chips and backed each one with his cheque card. His account thereby became overdrawn in excess of his agreed overdraft limit. He was convicted of obtaining a pecuniary advantage by deception (under s. 16(2)(b)), and his appeal to the House of Lords was dismissed.

35. R v. Lambie [1982] A.C. 449. The defendant used her credit card to buy goods in a Mothercare shop at a time when she had already exceeded her credit limit. She was charged with obtaining a pecuniary advantage by deception (under s. 16(2)(a), since repealed) and convicted. Her conviction was quashed by the Court of Appeal (distinguishing Charles) but was restored by the House of Lords.

whether the defendant had authority from the bank or the credit card company to use the cheque or credit card: all they were concerned with was that the cheque was backed by a cheque card or that the conditions of the credit card were fulfilled so that the bank or credit card company would honour the payment. However, the House of Lords said in both cases that there had been a deception. In each case, the House attached importance to the fact that the person accepting the cheque or credit card would have cared if he had known the defendant had no authority to use the card, as this would have made that person a party to the fraud. Had the decisions been the other way, a serious gap in the law of dishonesty would have been revealed which would almost certainly have led to calls for it to be filled. There may of course be potential for other supposed gaps in the law to be closed by judicial interpretation of concepts in existing offences.

3.25 This brief outline of the various offences and their manner of interpretation permits us to turn in the following Part to the gaps which might be left in the law if conspiracy to defraud were abolished.

## PART IV

## IDENTIFICATION OF THE GAPS WHICH WOULD BE LEFT BY THE ABOLITION OF CONSPIRACY TO DEFRAUD

### A. Introduction

4.1 This part of the paper addresses the question: if conspiracy to defraud were abolished, what gaps would be revealed in the criminal law against fraud? Before we attempt to answer this however, two preliminary points will be made.

4.2 The first is to re-emphasise that the common law offence of conspiracy to defraud is in its full ambit an extremely broad offence.[1] As well as covering conduct which would not amount to an offence if committed by a single individual, it also embraces conspiracies to commit many specific offences where loss is inflicted on another by dishonest means, for example, theft, robbery, burglary, obtaining by deception and many others including minor offences created by statute and triable summarily. The overlap before the Criminal Law Act 1977 was very substantial and will continue to be after the Criminal Justice Act 1987. In looking at the gaps which would arise if conspiracy to defraud were to be abolished therefore, we are necessarily concerned with a number of disparate, often seemingly unconnected, areas of fraudulent conduct.

4.3 Secondly, we make the point that the gaps which would arise from the abolition of conspiracy to defraud are not all of the same type. A number of gaps are relatively easy to identify; that is to say, those cases where the

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1. See para. 2.1, above.

common law offence is clearly capable of being used in circumstances where a course of fraudulent conduct is agreed upon by two or more persons which does not involve the commission of any specific offence: these we describe as "gaps in the law". Some gaps may be greater in practice than they are in theory because an existing offence, although in theory applicable, may be an unsuitable charge to use in the circumstances. Moreover, as the strict application of the decision in Ayres[2] demonstrated, there may also be gaps arising in practice where in theory there is no gap in the law at all, for example because of the unsuitability of a charge of the only available substantive offence (which may also carry a maximum penalty which is clearly inadequate for the worst case in point) or because the essence of the conduct does not fit comfortably into the present scheme of offences.[3]

## B. Possible gaps

### 1. The temporary deprivation of property of another, including the use of another's facilities

4.4 Cases of temporary deprivation of property belonging to another may involve either an appropriation or an obtaining by deception, but the behaviour is not an offence of theft or of obtaining by deception because the actor has no intention of permanently depriving the other of his property. Likewise, in cases where the borrower merely uses another's facilities he has, in general, no intention permanently to deprive. In many situations where a person

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2. [1984] A.C. 447: see para. 1.3, above.

3. The procedural and other advantages of being able to bring a charge of conspiracy to defraud are considered in more detail in Part VI.

does no more than temporarily deprive another of property or uses another's facilities no offence at all will be committed.[4] In certain circumstances, however, temporary deprivation may amount to a specific offence,[5] as may also the unauthorised use of facilities.[6]

4.5 It is not entirely clear how far a charge of conspiracy to defraud might be used in cases involving a temporary deprivation or use of another's facilities. It is arguable that the definition given to conspiracy to defraud in Scott v. Metropolitan Police Commissioner[7] is

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4. However, if a borrowing or lending is "for a period and in circumstances making it equivalent to an outright taking or disposal" the person appropriating or obtaining the property by deception may have an "intention permanently to deprive": see Theft Act 1968, s.6(1). See also Smith, The Law of Theft (5th ed., 1984), para. 133.

5. E.g., the taking of a motor vehicle: Theft Act 1968, s.12 (see para. 3.18, above); the removal of articles from places open to the public: Theft Act 1968, s.11 (see para. 3.19, above); or where a person makes off without paying, knowing that payment on the spot is required: Theft Act 1978, s.3 (see para. 3.13, above). An example of the last mentioned would be where the defendant hires an article and, having returned it, makes off without paying the hire charge. As regards the hire charge, however, it seems that there must be an intention never to pay; see R v. Allen [1985] A.C. 1029.

6. E.g., where a person has obtained services by deception: Theft Act 1978, s.1; but this will only be the case if there is "an understanding that the benefit has been or will be paid for"; or, where the facility uses electricity, abstraction of electricity: Theft Act 1968, s.13 (see para. 3.17, above).

7. [1975] A.C. 819 and see para. 2.1, above. The case involved the temporary deprivation of feature films, but this led to the holders of the copyright being permanently deprived of the lost profits caused by the infringement of copyright.

wide enough to embrace such conduct.[8] On the other hand, the Court of Appeal recently held[9] that an agreement by two debtors dishonestly to induce a creditor company to wait for payment in respect of goods already delivered was not a conspiracy to defraud. The reasoning which led the court to this conclusion was that Parliament had accepted in section 2 of the Theft Act 1978 that such conduct should only be an offence where the debtor had an intent to make permanent default.[10] Although this reasoning has been criticised,[11] it could equally apply in relation to temporary deprivation and section 1 of the Theft Act 1968.

4.6 Whatever the present position may be, it is perhaps worth nothing that in the previous working paper we concluded that the conduct in this area which needed to be penalised included -

> "The unlawful taking of property (not amounting to theft), without deception, which has the effect of depriving the victim of the charge he would [normally] have made for the use of the property."[12]

We sought views on whether there was any need to provide a wider offence to penalise, for example, the unauthorised

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8. According to Smith and Hogan, Criminal Law (5th ed., 1983), p.241, "temporarily to deprive another of his property [is not theft]; yet an agreement so to do is clearly capable of amounting to conspiracy under the decision in Scott". Arlidge and Parry, Fraud (1985), agree: see para. 12.42. This view has, however, been doubted: see Leigh, The Control of Commercial Fraud (1982), p. 101.

9. R v. Zemmel and Melik (1986) 82 Cr.App.R. 279.

10. Ibid., p. 284.

11. [1985] Crim.L.R. 213, at pp.214-215 (comment by Professor Smith).

12. See Working Paper No. 56, para. 84(1)(a)(i).

borrowing of a neighbour's lawn mower, but our provisional view was that such an offence was unnecessary. We also pointed out that the unauthorised use of another's facilities would not be penalised by the narrow offence proposed, but that such conduct probably did not call for criminal sanctions. The weight of consultation on the working paper was against the provision of even the narrow offence, mainly on the ground that it would be an unnecessary intrusion of the criminal law into an area which ought primarily to be the concern of the civil law. Views may, however, have changed since then. We therefore return to this issue later in the paper.[13]

2. The taking of land or those things mentioned in section 4(3) and (4) of the Theft Act 1968 excluded from being the subject of theft

4.7 For the purposes of theft and obtaining property by deception, property is defined[14] as including "money and all other property real or personal, including things in action and other intangible property" and therefore includes anything of economic value. However, certain property is excluded from the ambit of theft: the excluded property consists of land (except in certain cases), things growing wild on land (unless picked for commercial purposes) and game (unless reduced into possession by another).[15] An agreement to appropriate property of this kind excluded from being the subject of theft might amount to a conspiracy to defraud and, therefore, arguably a gap in the law would be left if that offence were abolished.

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13. See Part XIII.

14. Theft Act 1968, s.4(1).

15. Ibid., s.4(2)-(4).

4.8 The Criminal Law Revision Committee[16] considered in detail the question whether land, things growing wild, and game should be included in property capable of being stolen and reached the compromise solution embodied in section 4 of the Theft Act 1968. In our provisional view, the abolition of the offence of conspiracy to defraud would call for no change in this.[17] We take into account the fact that all property can be the subject of an offence of obtaining by deception under section 15 of the Theft Act 1968.

3. Deceiving a machine (including a computer)

4.9 It seems reasonably clear on the authorities that the element of "deception" in the offences of deception in the Theft Acts involves the inducing of a state of mind in another person. For this reason "deception" of a machine, by dishonestly misusing or tampering with it, would not be sufficient on its own to amount to a deception for the purposes of those offences. Where a person dishonestly misuses or tampers with a machine it is possible that other offences may be committed. For example, if by deceiving a machine a person obtains property, there will invariably be an appropriation and theft could be charged. Other offences, such as making off without payment, abstracting electricity, false accounting or forgery, none of which includes deception as an element, may be available to be charged. Where there is an agreement by two or more persons, conspiracy to defraud could also be a possible charge since an intent to deceive is not required.

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16. Eighth Report, Theft and Related Offences (1966), Cmnd. 2977, paras. 40-58.

17. A similar conclusion was reached in Working Paper No. 56 (at para. 60) and was confirmed by the views expressed on consultation.

4.10 It was suggested in the earlier working paper[18] that there were three main types of machine which may be fraudulently manipulated. These were, first, vending machines; secondly, machines, such as parking meters and telephones, which enable a person to obtain by payment a service or facility, or devices such as automatic barriers at the exit to a car park which are provided to receive payment for a facility already enjoyed; and, thirdly, computers and the like. The first category gives rise to no difficulty since a person who dishonestly obtains goods from vending machines commits theft. As regards the second category, the working paper suggested that the cases had nearly all been trivial and that, if criminal sanctions were required, they might be best controlled by offences of a regulatory nature. Some of those whom we consulted thought that each type of machine should be covered by separate legislation governing conduct in the area in which the machine was used, so that parking meters should be dealt with under the regulation of road traffic, telephones under the regulation of telecommunications and so on. On the other hand, others felt that a general offence that would cover all dishonest manipulation of such machines would be more satisfactory. The general tenor of the comments, however, was that in relation to the dishonest manipulation of certain machines there may be gaps in the criminal law which are, in theory, presently covered only by conspiracy to defraud.

4.11 In relation to the third category, computers, the working paper recognised that they "present a potentially much more serious possibility of fraudulent misuse";[19] but concluded that the person who dishonestly manipulates a

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18. See Working Paper No. 56, para. 61.

19. See ibid., para. 63.

computer in order to obtain money or other property would, in general, be guilty of an existing offence and there was, therefore, no need to rely on conspiracy to defraud in prosecuting such cases.

4.12 This is clearly not an appropriate place to review every aspect of what may loosely be termed "computer crime". A number of issues have been raised in this wide context so far as the adequacy of the criminal law is concerned which are the subject of separate examination by the Commission:[20] one in particular is computer "hacking", that is, obtaining unauthorised access to another's computer.[21] We confine ourselves here to the narrower issue of computer fraud, that is the dishonest manipulation of computers in order to obtain money, property or some other advantage of value or to cause loss.

4.13 Contrary to the view taken in our earlier working paper, we think that there would be a gap in the law in this area if conspiracy to defraud were to be abolished without replacement. We accept that, when a computer is manipulated in order to obtain money or other property, a charge of theft can generally be brought. On the other hand, when a computer is manipulated or "deceived" in order to obtain one of the other benefits protected by the Theft Acts, such as valuable services, or a pecuniary advantage, or the execution of a valuable security, or the evasion of a liability, and no human mind is deceived, no charge of obtaining by deception can be brought under the law as it

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20. See Twenty-First Annual Report 1985-1986 (1987), Law Com. No. 159, para. 2.15.

21. In R v. Gold and Schifreen [1987] 3 W.L.R. 803, the Court of Appeal held that such conduct did not amount to forgery under the Forgery and Counterfeiting Act 1981. (The Court of Appeal certified a point of law of general public importance but refused leave to appeal.)

stands at present.[22] If the fraud depends upon the generation of false output from a computer which will then be acted upon by someone, the problem will not arise because the person reading the output will be deceived. In some cases the person could be charged with abstracting electricity. However, the quantity of electricity consumed in cases where a computer provides a benefit or service may be so small that it may be almost infinitesimal in itself and insufficient to justify a criminal charge. But, even if a charge of abstracting electricity can be made out, it seems to be a rather unsatisfactory charge to rely on, because it does not meet the nub of this type of case.

4.14 Our provisional view is that, in relation to the deception of a machine, including a computer, for the purpose of obtaining certain benefits or causing a loss, there may be a gap in the criminal law which at present is only capable of being dealt with by conspiracy to defraud and therefore only in circumstances where two or more persons are involved.

4. A false general impression

4.15 Before the passing of the Theft Act 1968, conspiracy to defraud was used to extend the limits of the

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22. Smith, The Law of Theft (5th ed., 1984), p. 82. In Moritz (1981, Acton Crown Court), a case which involved charges under s.38 of the Finance Act 1972, the trial judge held that "deception" required a human mind to be deceived and that, given the computer assisted nature of the processing of VAT returns there was in that case no satisfactory evidence to put to a jury that an admittedly false VAT return which had secured unwarranted repayments had "deceived" in the required sense: see Report of the Keith Committee on Enforcement Powers of the Revenue Departments (1983), Vol. 2, para. 18.3.17. In accordance with a recommendation of that Committee (see para. 18.4.2), the gap in what is now s.39 of the Value Added Tax Act 1983 has since been filled: see para. 10.5, below.

offence created by section 32 of the Larceny Act 1916 in relation to obtaining a chattel, money or valuable security by a false pretence.[23] Under that section the "false pretence" which was a requirement of the offence was confined to a pretence as to existing facts,[24] whereas conspiracy to defraud was frequently used to prosecute a combination to obtain money, goods or some other advantage where the defendants did not intend to give in return either what was reasonably expected or at least what was impliedly offered. Section 15 of the Theft Act 1968 so defines deception as to include within it a deception as to the present intentions of a person. In the result many of the cases which were not within section 32 of the Larceny Act 1916 because of the narrow meaning of the false pretence required for that offence are now covered by section 15 of the Theft Act 1968. Nevertheless conspiracy to defraud is still used in cases where there is doubt whether a dishonest course of conduct amounts to deception within the meaning of that word in section 15, either because the falsity is too general to come within the definition or too vague to establish a causal connection with the obtaining of the property or advantage.

4.16 One type of case from former times where conspiracy to defraud was relied upon is illustrated by Parker and Bulteel.[25] The defendants were directors of a bank, which had carried on business for many years although it was insolvent and which finally failed. The defendants were

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23. See T.B. Hadden, "Conspiracy to Defraud", [1966] C.L.J. 248.

24. R v. Dent [1955] 2 Q.B. 590.

25. (1916) 25 Cox CC 145.

convicted of conspiracy to defraud in that they had combined to induce persons to deposit money with the bank by falsely representing that the bank was solvent, was conducting its business in the ordinary way in which a bankers' business was conducted, and that it could fulfil in the ordinary course its obligations to its customers. The representations arose, it was held, solely from the fact that the defendants carried on business as a bank thereby impliedly representing that it could meet its obligations to the customers. Another type of case where conspiracy to defraud was frequently used is that known as the "long-firm fraud". In this instance the defendants, ostensibly as an ordinary trading concern, gain the confidence of creditors and obtain quantities of goods on credit with no prospect or intention of paying for them, or at least for a very large proportion of them. The goods are then sold, usually at a reduced price, over a period, during which other goods may be bought on credit. Meanwhile, the defendants withdraw large sums from the business leaving creditors without any assets from which they can be paid.

4.17 In these cases there is almost always a deception within the meaning of section 15(4) of the Theft Act 1968 (where, for example, it can be established that the incurring of the debt amounted to a deception as to the debtor's intention to pay), so that it is at least possible to say that there was a conspiracy to commit the offence of dishonestly obtaining property (or services) by deception. However, we are aware that it is sometimes difficult in practice for the prosecution to establish exactly what deception induced, or was intended to induce, a particular person to part with property, and even, in some cases, the precise facts which constituted the deception. A number of those concerned with the prosecution of this type of offence

whom we consulted[26] stressed the complexities involved in prosecuting cases of this sort if conspiracy to defraud were to be abolished without adequate replacement. The arguments were twofold: first, that the ingenuity of dishonest persons was always finding new ways of defrauding others, and second, that in a complex scheme it was often difficult to pinpoint particular transactions and to establish specific deceptions even when the fraudulent character of the scheme as a whole, taking into account all the evidence, was perfectly obvious.

4.18 A recent case which illustrates these difficulties is Cox and Mead.[27] In that case, one defendant was convicted of conspiracy to defraud, while another was acquitted of a similar charge but was convicted of fraudulent trading.[28] The Court of Appeal held, applying Ayres[29] and Tonner,[30] that the conspiracy to defraud count was bad because the conspiracy involved the commission of a number of substantive offences. Although it was able to substitute a verdict of guilty on a count charging conspiracy to obtain property and services by deception, the Court commented on the considerable disadvantages for prosecutors and for the jury of not being able to charge a single count of conspiracy to defraud in "long-firm" fraud cases.

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26. Following publication of Working Paper No. 56 (see para. 40), where the provisional view was that no gap would arise in this area.

27. The Times, 6 December 1984.

28. Under s.332 of the Companies Act 1948 (now s.458 of the Companies Act 1985).

29. [1984] A.C. 447: see para. 1.3, above.

30. [1985] 1 W.L.R. 344.

4.19 Technically there is probably no gap in the substantive law here, although the points raised above suggest that if conspiracy to defraud were abolished there would be many cases which could not properly and manageably be presented in court. It might not be a satisfactory answer to leave cases such as these to be dealt with by existing offences.

5. Commercial swindles

4.20 Under this heading our earlier working paper examined a number of commercial swindles which had been prosecuted by means of charges of conspiracy to defraud where the element of deception had been of little, if any, importance.[31] We said that:-

> "in the field of economic fraud in commerce, there would probably be gaps left by the restriction of conspiracy [to agreements involving the commission of an offence] ..."[32]

Our provisional conclusion was that at least some of these gaps required filling but that:-

> "It would be inappropriate in a general statute [dealing with fraud] to attempt to cover such exceptional cases, and that a general offence of dishonestly prejudicing another economically would be unacceptably wide. It is our view that special cases of this nature should be dealt with in legislation related to the matters with which they are concerned...."[33]

4.21 The legislation which the working paper contemplated for amendment to cover these "special cases" included enactments dealing with companies, bankruptcy and

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31. See Working Paper No. 56, paras. 42-47.

32. See ibid., para. 47.

33. See ibid., para. 65.

copyright, but no specific proposals for reform were made. It has recently been said of the omission to propose any new offences in this area that "if persisted in, (it) will inhibit an effective response to some prevalent and lucrative frauds".[34]

4.22 While we do not necessarily dissent from this last comment, it would seem that all the cases of conspiracy discussed in the working paper under this heading would now involve the commission of an existing substantive offence. We examine briefly some of the cases mentioned there as well as a few more recent cases involving commercial fraud.

4.23 The first case was Scott v. Brown Doering, McNab & Co.,[35] which involved the practice of "market rigging". Such conduct is now expressly covered by the offence created by section 47 of the Financial Services Act 1986 which carries a maximum penalty of seven years' imprisonment.[36]

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34. Sullivan, "Fraud and the Efficacy of the Criminal Law: a Proposal for a Wide Residual Offence", [1985] Crim.L.R. 616, 617.

35. [1892] 2 Q.B. 724. The plaintiff and M had agreed to purchase for P on the Stock Exchange a number of shares at a premium, with the sole object of inducing members of the public to believe that there was a market for the shares at that price, and to subscribe a further issue of such shares. As both parties knew, the premium was not justified by the true position of the company. The Court of Appeal dismissed the plaintiff's claim to recover the purchase money he had entrusted to M, because the agreement was unenforceable, being, as it was said, an indictable conspiracy to defraud those who might buy shares in the company.

36. This penalises, inter alia, any person who does any act or engages in any course of conduct which creates a false or misleading impression as to the market in or the price or value of any investments for the purpose of creating that impression or of thereby inducing another to acquire, dispose of, subscribe for or underwrite those investments. It is not necessary for any person who has dealt in the investments in the manner specified to suffer any economic loss.

Another case was Sinclair and others[37] which involved a complicated series of transactions under which the directors of a company transferred almost the whole of a company's assets to an outsider in return for a vague agreement that he would use them to inject capital into the company. He in fact bought a controlling interest in the company. Two of the accused were convicted of conspiracy to contravene section 54 of the Companies Act 1948, which prohibited a company from giving financial assistance towards the acquisition of its own shares and carried a maximum penalty of a £100 fine, and all of them of conspiracy to defraud the company, its minority shareholders and creditors. Since company directors could now face a maximum penalty of two years' imprisonment for contravening the provisions under section 151 of the Companies Act 1985 (which indirectly replaced section 54 of the 1948 Act), abolition of conspiracy to defraud would not appear to leave a gap in the law here.

4.24 Two other cases concerned, respectively, an agreement by traders to conceal goods from creditors in anticipation of bankruptcy (Hall)[38] and an agreement to confer a fraudulent preference on one of several creditors (Potter).[39] A prospective bankrupt would not be guilty of theft in these circumstances because the property is legally his own. However, there are a number of offences now contained in the Insolvency Act 1986 which cover certain acts done by individuals either after the commencement of bankruptcy or within certain periods beforehand: broadly speaking, these offences would appear to be adequate, without the need to resort to charges of conspiracy to

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37. [1968] 1 W.L.R. 1246.

38. (1858) 1 F & F 33.

39. [1953] 1 All E.R. 296.

defraud. If the individuals are carrying on the business of a company in similar circumstances they may be guilty of fraudulent trading.

4.25 In de Kromme[40] the defendant went to a warehouse and tried to bribe an employee to sell him goods below the listed price. He was convicted of inciting the employee to conspire with him to cheat and defraud his employer. Although a charge of incitement to conspire is not available,[41] such conduct could be charged as an offence of corruption under section 1 of the Prevention of Corruption Act 1906[42] or as an attempted theft.

4.26 Another case involved railway employees who took used but uncancelled tickets and resold them at a lower price for reuse (Quinn).[43] Apart from being liable to be convicted of theft of the card on which the tickets are printed (or handling stolen property), they could also now be charged with obtaining the passengers' money by deception (provided the passengers were not also parties to the fraud) or with going equipped to cheat.[44]

4.27 As already explained, the House of Lords in Scott v. Metropolitan Police Commissioner[45] confirmed that there is no need to prove an agreement to defraud by deceit to sustain a charge of conspiracy to defraud. This case

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40. (1892) 17 Cox CC 492.

41. See Criminal Law Act 1977, s.5(7).

42. The Criminal Justice Bill proposes to increase the maximum penalty for this offence from two years' imprisonment to seven.

43. (1898) 19 Cox CC 78.

44. Theft Act 1968, s. 25.

45. [1975] A.C. 819: see para. 2.1, above.

involved a major commercial fraud upon a nationwide scale by a large number of conspirators. Over a period of two years Scott, with many others, agreed with the owners of cinemas to borrow copies of films, so that he could make further copies for distribution on a commercial basis. One of the means by which some of the conspirators obtained possession of the material to be pirated involved corruption of cinema employees. Another of the means was "theft" but it is doubtful whether such a charge could in fact have stood because there was no intent permanently to deprive. Charges under the Copyright Act 1956 were available, but would not have been entirely appropriate because the case was not only concerned with injury to copyright holders but also injury to holders of distribution rights, and in any event the maximum penalties at the time were minimal. The penalties for certain offences under the Copyright Act have since been increased to a maximum of two years' imprisonment, but it has been doubted whether the new penalties are adequate.[46]

4.28 Finally, in Landy,[47] a bank made excessive advances to its controllers and to insubstantial and speculative trading companies in which they had a financial interest, without adequate securities or guarantees or proper provision for the payment of interest, all of which caused it to be put into liquidation with a deficit of some £38 million. The defendants were charged with conspiracy to defraud, as well as conspiracy to utter forged documents. The convictions for conspiracy to defraud were quashed on appeal because in directing the jury the trial judge did not put fairly their defence of honest but careless mistake.

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46. See Lloyd [1985] Q.B. 829, 833 and Criminal Law Revision Committee, Eighteenth Report, Conspiracy to Defraud (1986), Cmnd. 9873, para. 3.6.

47. [1981] 1 W.L.R. 355.

What other existing substantive offences might have been charged instead of conspiracy to defraud? Theft would appear to be ruled out, since the abstraction of funds took the form of banking advances which were authorised at the highest level within the bank. The preparation of annual accounts and the Bank of England returns which concealed the true nature and extent of the bank's lending and showed a false and misleading financial situation could have given rise to charges under sections 17 and 19 of the Theft Act 1968. If the false accounts induced the making of deposits, charges under section 39 of the Banking Act 1979 (inducing deposits by deceptive statements or promises or by dishonest concealment of material facts) or section 15 of the Theft Act 1968 might have been brought, although in establishing causally relevant concealment and deceptions much would depend on the precise facts of particular transactions. A number of different offences might therefore have been charged in place of conspiracy to defraud. On the other hand, as with Scott, it is arguable that none of these charges would really have reflected the seriousness of the alleged wrongdoing which in this case was causing loss to the bank's depositors and investors by the abstraction of large sums of money.

4.29 The reported cases which have been considered above necessarily represent only a handful of commercial fraud cases which have been charged in the past as conspiracy to defraud. Nevertheless, we do not believe that there are at present any significant gaps in the law in this general area. However, some of the cases in this field, like Scott and Landy and others, point to a significant advantage of a charge of conspiracy to defraud, namely that it is able to reflect the essence of the defendant's conduct in a way which existing statutory offences cannot always do. This is then a further area where the abolition of conspiracy to defraud would inhibit the prosecution of fraudsters.

6. Gambling swindles

4.30 Certain gambling swindles may be regarded as dishonest and deserving of criminal sanction and yet involve neither theft nor an offence of criminal deception. If A lays a bet with B that C's horse will win a race and, later, to make this more likely, A drugs the other horses in the race, with the result that C's horse does win and B pays A a sum of money, there is neither an appropriation nor an operative deception. It is, however, arguable that A's behaviour is dishonest and deserving of criminal sanction and that if A acted following an agreement with another the conduct would be within the scope of conspiracy to defraud.

4.31 Some gambling swindles may involve an appropriation of property and be punishable as theft or involve a deception, while others may be prosecuted under section 17 of the Gaming Act 1845.[48] Section 17 is applicable without difficulty to cases where the dishonest person is participating in "cards, dice, tables or other game", but where he is wagering on the result, or where it is arguable the money is won because of winning or losing the game and not because of the fraud, difficulties may arise. Furthermore, the section does not cover cases where a bet is laid upon the outcome of a non-sporting event or, it seems, an event such as a horse race. It therefore seems that there would be a small gap in the law in this area if conspiracy to defraud were to be abolished without replacement.

7. Dishonest failure to pay for goods or services

4.32 The omission from the scheme of the Theft Act 1968 in this area which was identified in the earlier working

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48. See para. 3.23, above.

paper[49] has since been covered by the offence of "making off without payment" in section 3 of the Theft Act 1978. However, in one particular respect the offence may be considered to be too narrowly drawn. In Allen,[50] the House of Lords decided that the words "with intent to avoid payment" in the section require an intention to avoid payment permanently and that an intention to delay or defer payment does not suffice to establish the offence. As the House pointed out, their interpretation of the words in the section accorded with the recommendation of the Criminal Law Revision Committee. However, if two people agreed to make off without paying for goods or services with the intention of delaying or deferring payment but without necessarily having an intent to make permanent default, it is arguable that this would amount to a conspiracy to defraud (although it is doubtful whether under the D.P.P.'s guidelines a prosecution for the offence would be authorised in these circumstances).[51] Since we are looking at the general question of criminal liability for temporary deprivation, there appears to be a case for considering the issue raised here at the same time.[52]

8. Secret profits by employees and fiduciaries

4.33 Section 5(1) of the Theft Act 1968 provides that:

> "property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest)."

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49. See Working Paper No. 56, para. 49.

50. [1985] A.C. 1029.

51. See para. 2.9, above.

52. See Part XIII.

It is clear that the term "proprietary interest" includes most forms of beneficial interests in property held on trust. However, the extent to which it protects beneficiaries under a constructive trust (meaning a trust not created expressly but imposed by equity as a matter of justice) is less clear, particularly in the light of the Court of Appeal's decision in Attorney General's Reference (No. 1 of 1985)[53] which concerned the making of a secret profit by a person (an employee) in a fiduciary position. While such conduct may not amount to theft (whether or not it gives rise to a constructive trust), a charge of conspiracy to defraud may be available where two or more persons are involved.

4.34 In the Attorney General's Reference the manager of a public house contracted with his employers, brewers, to sell only liquor and other goods supplied by them and to pay all the takings into their account. The manager bought beer from another source intending to sell it to customers in order to make a secret profit. The manager was clearly liable to account to his employers for any profit he made and he could have been dismissed. In the Court of Appeal it was argued that the effect of section 5(1) of the Theft Act 1968 was to make the manager (who was in a fiduciary position in relation to his employers) a constructive trustee of the profit element of the "bought-in" beer, the beneficiary of the trust being his employers, with the result that when the manager appropriated the money he was guilty of theft (assuming dishonesty to be proved). However, the Court of Appeal rejected the argument, saying that, whatever was the position with regard to the person who misappropriates specific property with which he has been entrusted, "a person in a fiduciary position who uses that position to make a secret profit for which he will be held

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53. [1986] Q.B. 491.

accountable" was not a trustee.[54] In reaching that conclusion the Court relied on a number of authorities including Lister & Co. v. Stubbs[55] and said that it could see no distinction in principle between the bribe in that case and the transactions in the instant case. The Court added that, since the employers could not sue the customers for the price of the beer, they could not be said to have a "proprietary interest" in the proceeds of sale or any part of it. Moreover, even if section 5(1) did import a constructive trust into the Theft Act, the employers still obtained no proprietary interest because the profit element "never became a separate piece of property of which [the manager] could be trustee." There was therefore never a time at which the employers had any proprietary interest in any of the money. The Court added in conclusion that, if something was so far from the understanding of ordinary people as to what constitutes stealing, it should not amount to stealing.[56]

4.35 The reasoning of this decision has been challenged by commentators[57] on a number of grounds; nevertheless, on the assumption that theft must be ruled out, there remains the possibility of a charge of conspiracy to defraud. Despite Lord Wilberforce's view in Tarling (No. 1) v. Government of the Republic of Singapore[58] that the making of secret profits in breach of fiduciary duty by itself was no criminal offence (not even fraud), the House of Lords has

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54. Ibid., at p.503.

55. (1890) 45 Ch.D. 1.

56. [1986] Q.B. 491, 507.

57. See e.g. P.St.J. Smart, "The Constructive Trust in the Law of Theft", (1986) 136 New L.J. 913; Professor Smith, [1986] Crim.L.R. 476, at 478-479.

58. (1978) 70 Cr.App.R. 77, 110.

recently held that an agreement to make a secret profit which causes loss to another is capable of constituting a conspiracy to defraud.

4.36 In Cooke,[59] railway stewards took on board a train their own coffee, tea, cheese and beefburgers and sold these to passengers with the intention of keeping the proceeds and not accounting for them to British Rail. On two grounds the House of Lords allowed an appeal by the prosecution against the Court of Appeal's decision to quash the conviction for conspiracy to defraud. First, they held that where it could be shown that there had been an agreed course of fraudulent conduct going beyond an agreement to commit specific offences, it was legitimate to charge either conspiracy to defraud on its own or both conspiracy to defraud and statutory conspiracy to commit a substantive offence.[60] They pointed out that the fraud on British Rail was not, of itself, specifically criminal, in the sense that if an individual had practised the fraud he would not have incurred criminal liability in respect of that aspect of his conduct, although it was "far the most serious aspect of the affair"; and since more than one person was involved the charge of conspiracy to defraud could stand. The second ground was that there was insufficient material to justify the inference that the stewards had agreed on a course of conduct which necessarily involved the deception of passengers and therefore the commission of an offence under either section 25 (going equipped to cheat) or section 15 of the Theft Act 1968.

4.37 It may be noted that in Cooke Lord Mackay said that he did not think that the fraud on British Rail constituted

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59. [1986] A.C. 909.

60. See now Criminal Justice Act 1987, s.12 and para. 1.4, above.

theft of its money: "Attorney-General's Reference (No. 1 of 1985) negatives (that) contention ...".[61] But had the defendants in that case been charged with conspiracy to defraud, it would seem that they might have been convicted of conspiring to defraud the brewers on the basis that the profit on the unlawful sales was "something to which [the brewers are] or would be or might be entitled" and therefore a conspiracy to defraud within the definition given by Viscount Dilhorne in Scott. Their conduct was no different from that of the railway stewards in Cooke or the railway employees in Quinn.[62]

4.38 It would seem, therefore, that in respect of the employee (and probably any person in a fiduciary position) who dishonestly makes and retains a secret profit for which he is accountable the abolition of conspiracy to defraud would leave a gap in the law.

9. Manufacture and supply of material designed to defraud (including commercial counterfeiting)

4.39 The decision of the House of Lords in Hollinshead[63] has exposed another possible area of activity which, it seems, is capable of being tackled at present only by conspiracy to defraud. In that case the defendants made and sold devices (black boxes) the admitted sole function of which was for attachment to authorised electricity meters with a view to reversing the current and so reducing the charges for electricity. The House of Lords found this to be a conspiracy to defraud the electricity authorities on

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61. [1986] A.C. 909, 934.

62. See para. 4.26, above.

63. [1985] A.C. 975.

the principles of Scott.[64] There was no evidence, the House held, of a statutory conspiracy to commit an offence, nor - if it was capable of being charged - conspiracy to aid and abet such an offence. Acceptance of the House's reasoning[65] leads to the conclusion that the making and supply of material designed to defraud may in some cases be capable of punishment only by charges of conspiracy to defraud.

4.40 A parallel situation to that in Hollinshead is one involving the "counterfeiting" of goods. Counterfeiting, in this sense of the term, involves a fraud on the manufacturer of a genuine product. It also involves a fraud on the purchasers of the product (whether as trader or ultimate consumer), unless of course it is bought with knowledge that it is a counterfeit product. A recent instance involved the manufacture and supply of fake Chanel products. In Pain, Jory and Hawkins[66] the defendants were originally charged with conspiracy to defraud Chanel Limited. At their trial, it was successfully argued on their behalf that the counts were bad since the carrying out of the conspiracy involved substantive offences under the Trade Descriptions Act 1968. Moreover, because the conspiracy would have involved the selling of the Chanel abroad the prosecution took the view that no charges of conspiracy to obtain by deception would have been justiciable in England and Wales. The Criminal Law

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64. [1975] A.C. 819.

65. See further, comment by Professor Smith, [1985] Crim. L.R. 655. Hollinshead was followed in R v. James and Ashford (1986) 82 Cr.App.R. 226. The Criminal Law Revision Committee also agreed that the conduct in these cases amounted to conspiracy to defraud: see Eighteenth Report, Conspiracy to Defraud (1986), Cmnd. 9873, para. 3.17.

66. (1986) 150 J.P. 65.

Revision Committee commented in connection with this case that (as the law then stood) "this kind of serious counterfeiting cannot be charged as a conspiracy to defraud. The penalties under the Trade Descriptions Act 1968 (which is for the protection of buyers) are not adequate, and were not intended to deal with large scale frauds."[67] There may therefore be a gap in the law here which would require to be filled if conspiracy to defraud were abolished.

10. Fraudulent acquisition of confidential information

4.41 Information, particularly confidential information, will often be regarded as a valuable commodity. Information of one kind or another is frequently bought and sold. A right to confidential information is similar in some respects to a proprietary right and occasionally the courts have referred to such information as being "property";[68] and for certain specific purposes the courts have treated it as such.[69] Nevertheless information does not fit easily into the traditional concepts of either tangible or intangible objects, and its nature is such as to place it in a category of its own, distinct from that of property. It is perhaps not surprising that the Divisional Court should have established that for the purpose of section 4(1) of the Theft Act 1968, information of itself is not intangible "property", so that a charge against a student of stealing confidential information contained in the proof copy of an examination paper was misconceived.[70] (Had he removed the

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67. Op. cit., para. 3.12.

68. See e.g. Boardman v. Phipps [1967] 2 A.C. 46.

69. In Re Keene [1922] 2 Ch. 475 (C.A.), for instance, it was held that a secret formula relating to certain proprietary articles passed to its owner's trustee in bankruptcy.

70. Oxford v. Moss (1978) 68 Cr.App.R. 183.

examination paper with the intention of keeping it permanently, he would of course have been liable to be found guilty of theft of the paper.)

4.42 Although in law dishonestly obtaining information of itself cannot be charged as theft or obtaining property by deception, the criminal law does offer a degree of protection against such conduct under a variety of other headings. One such heading, it would seem, may be conspiracy to defraud. In the next section we consider the use of conspiracy to defraud in cases involving the obtaining of information by dishonest means from a person performing a public duty. But it is arguable that an agreement to obtain confidential information by dishonest means which results in its possessor (whether a public official or private individual) being deprived of some of its value as a result of losing it could also be charged as conspiracy to defraud. Such conduct would seem to fall within the definition of the offence in Scott.[71] In order to determine whether any gap might arise here, we need to examine the scope of the protection afforded to information by other offences. For this purpose, we exclude offences where liability is made to depend upon the physical removal of the medium upon which the information is recorded or stored.

4.43 Obtaining information by deception may constitute the offence of obtaining services by deception under section 1 of the Theft Act 1978, since to give information is to confer a benefit on the person who seeks it. However, a serious limitation arises because in order to constitute the offence, the benefit (the information) must have been supplied on the understanding that it has been or will be

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71. See para. 2.1, above; and see also Arlidge and Parry, Fraud (1985), para. 3.12.

paid for. Since the offence does not apply to the obtaining of information not supplied for payment, it will not cover, for example, the case of the industrial spy who acquires secret information from a company by deception of one of its employees. Nor will section 1 apply where the information is obtained by making unauthorised access to another's computer because of the principle that, as the law stands at present, a machine cannot be "deceived".[72] Copying certain types of information may be a breach of copyright and to sell the copy may be an offence under section 21 of the Copyright Act 1956. An offence of corruption under section 1 of the Prevention of Corruption Act 1906 might be charged, if information is obtained by inducing an employee or other agent to disclose it in return for a reward. If the receipt of the bribe is proved, both the employee and the person seeking the information are liable to be convicted. Finally, the Official Secrets Act 1911 contains provisions to protect certain information held by the Government from unauthorised abstraction and disclosure.

4.44 The offences mentioned above are each capable of being used to deal with particular situations involving the dishonest acquisition of information. None of them, however, deals with the problem of "stealing" valuable information generally. As we have said, it is arguable that conspiracy to defraud might be charged in a case involving an agreement to deprive another by dishonest means of his right to hold confidential information where economic loss might be suffered if the agreement were carried out. It is possible, therefore, that a gap in the law may arise here.

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72. See para. 4.9, above.

## 11. Non-economic frauds

4.45 So far we have been dealing with dishonest conduct aimed at acquiring something of economic value at the expense of another. We have now to consider the case where the dishonesty is not aimed at securing any financial advantage and in consequence there is no possibility of financial prejudice to another, whether or not he is the person upon whom the dishonesty is practised.

4.46 For many years conspiracy - charged as conspiracy to effect a public mischief - was used to prosecute conduct which two or more persons had agreed to commit, even though that conduct if committed by only one person would not have been criminal. The test applied by the court in such a case to determine whether the conduct amounted to a public mischief was whether it was in some way extremely injurious to the public.[73] In many of the cases[74] there was an element of deception though some[75] involved no deception. This line of cases was fully examined by the House of Lords in Withers[76] in reaching the conclusion that there was no separate and distinct class of criminal conspiracy called conspiracy to effect a public mischief, but that that description had in the past been applied to a number of cases which might have been regarded as coming within well known heads of conspiracy such as conspiracy to defraud or to pervert the course of justice.

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73. R v. Withers and Others [1975] A.C. 842, 869.

74. E.g. Brailsford [1905] 2 K.B. 730; Wolis (1910) 7 J.P. 28; Bassey (1931) 22 Cr.App.R. 160; and Newland [1954] 1 Q.B. 158.

75. E.g. Porter [1910] 1 K.B. 369 and Young (1944) 30 Cr.App.R. 57.

76. [1975] A.C. 842.

4.47 In Scott[77] Viscount Dilhorne said that he saw no reason why an intention to deceive a person holding public office or a public authority into doing or not doing something should not amount to intent to defraud in conspiracy to defraud, just as in Welham[78] forgery whereby such deceit had been accomplished had been treated as having been done with intent to defraud despite the absence of economic loss. Lord Diplock[79] went further, saying that where the intended victim of a conspiracy to defraud was a person performing public duties as distinct from a private individual it was sufficient if the purpose was to cause him to act contrary to his public duty and the intended means of achieving that purpose were dishonest, even though the purpose did not involve causing economic loss. There is therefore authority that it is conspiracy to defraud to agree to deceive a person performing a public duty to do or refrain from doing something contrary to that duty, even though it would not be an offence for one person to practise such a deception. It may also be that a conspiracy by any dishonest means, such as bribery, to induce a wrong performance of a public duty is within the offence of conspiracy to defraud.[80]

4.48 Our earlier working paper, which was published before the decisions of the House of Lords in Scott and Withers, examined the authorities where charges of conspiracy to effect a public mischief had been used to penalise non-economic frauds and suggested other activities

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77. [1975] A.C. 819, 839. Judgment was given on the same day as that in R v. Withers [1975] A.C. 842 in which appeal the same Law Lords sat.

78. [1961] A.C. 103.

79. [1975] A.C. 819, 841.

80. In most cases, however, such conduct would be penalised by the Prevention of Corruption Acts 1889 to 1916.

in this field where, on the general principles found in the decided cases, a charge of conspiracy to defraud would lie. The paper provisionally concluded[81] that:

> "it is in the field of non-economic prejudice that there will be the most pressing need for the creation of a new offence or new offences if conspiracy is restricted."

The paper then went on to consider the specific forms of behaviour in this field which were thought to require criminal sanctions.[82]

4.49 In the light of the limitation upon conspiracy to defraud in the non-economic field to cases where the victim is a person performing a public duty, as distinct from a private individual, provisions of the kind suggested in the earlier working paper would, in fact, go beyond what might now be necessary to fill any gaps that would be left in this area by abolishing conspiracy to defraud. In order to determine more precisely what gap would be left, it is important to know the extent of the present law. This depends in part upon the meaning to be attached to the words "public duty" in cases in which these words have been used in defining the ambit of the offence.

4.50 It is not easy to deduce from the decided cases any general principle for determining whether a duty is a public duty.[83] There appear to have been no reported cases since Withers and Scott where this aspect of conspiracy to defraud has been the subject of a charge. Nor can one obtain much assistance from the meaning given to these words in other

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81. See Working Paper No. 56, para. 56.

82. See paras. 67-79.

83. The decisions in Bassey (1931) 22 Cr.App.R. 160 and Newland [1954] 1 Q.B. 158 have been doubted: see R v. Withers [1975] A.C. 842, 858, per Viscount Dilhorne.

areas of the law in which they occur.[84] So far as it is possible to deduce a general principle from the cases, having regard to the fact that most of them were decided, not in relation to a charge of conspiracy to defraud, but in relation to a charge of conspiracy to effect a public mischief, it would seem to be that a public duty is a duty, the due performance of which is required in the general public interest. In other words, the test is whether it is "in some way extremely injurious to the public" that because of the deception or other dishonest behaviour the particular duty is not duly performed.[85] If it is then the duty is a public duty.

4.51 Bearing in mind the scope of this aspect of conspiracy to defraud, we can look again at the behaviour identified in the earlier working paper as requiring criminal sanctions and consider to what extent these would remain gap-filling measures.

(a) The making of false statements in relation to legislative schemes

4.52 The proposals here were for two new offences to take the place of sections 2 to 6 of the Perjury Act 1911 as well as of a number of other offences. In essence they were intended to place the offences in the 1911 Act on a more modern footing and, by widening the terms of one of them slightly, would allow many other existing statutory offences to be repealed and would make it unnecessary in future legislation to create further offences of this nature. The abolition of conspiracy to defraud would not,

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84. E.g. under the now repealed Public Authorities Protection Act 1893, s.1, and Limitation Act 1939, s.21(1).

85. R v. Withers [1975] A.C. 842, 869.

in our view, leave any significant gap in this area. We propose to put aside for the present the question of a review of the existing statutory offences mentioned.[86]

(b) Fraudulently inducing the non-fulfilment of statutory duty

4.53 We proposed that, where a person is under a statutory duty to act in a particular way (whether on pain of a penal sanction or not) and he is induced by deception to act otherwise than in that way, the person so inducing him should be guilty of an offence. In the light of Scott and Withers this offence would, on the one hand, clearly go much wider than would be necessary to fill any gap that might arise because the concept of public duty[87] is much narrower than statutory duty. On the other hand, the restriction to deception may not reflect the scope of this aspect of conspiracy to defraud.[88] The extent of the gap arising must depend on the scope of a number of other statutory offences in this field which in one way or another would overlap it. Some of them are mentioned below.

(c) Fraudulently obtaining the grant of a licence etc.

4.54 We proposed that it should be an offence fraudulently "to induce any person to grant any licence,

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86. Cf. our Report on Offences relating to Interference with the Course of Justice (1979), Law Com. No. 96 where we said, at para. 2.25, that we would be dealing with such offences in the Perjury Act 1911 as penalise the making of false statements outside judicial proceedings in the context of our work on fraud. There does not appear to us to be any pressing need for reform of these offences at the present time.

87. As defined in para. 4.50, above.

88. See para. 4.47, above.

certificate or permission required or given by or under any statute, or under any powers conferred by a statute." It was stated that these cases were all covered by conspiracy to defraud since they concerned the situation where a person is fraudulently induced to perform a duty in a way which he would not otherwise have performed it. There is a very wide range of activities over which both central and local government exercise a degree of control by requiring some licence, certificate, authority, permission or registration to be obtained for the carrying on of those activities. In the majority of cases the legislation has created an offence of making a false statement to obtain such a licence etc.;[89] it appears, however, that in a small number of cases there is no such penalisation.[90] In the case of registration as a person qualified to practise a vocation or calling there is a general provision in section 6 of the Perjury Act 1911. Where the licence etc. is in writing, a charge of obtaining property (the document) by deception would lie. If payment is expected for the licence, a charge of obtaining services by deception would also be possible. Our present view is that any gap arising in this area from the abolition of conspiracy to defraud would be likely to be very small and largely theoretical.

(d) Fraudulently obtaining membership of an organisation or society

4.55 It was proposed that it should be an offence to obtain by deception membership of an organisation which

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89. E.g. Misuse of Drugs Act 1971, s.18(4); Firearms Act 1968, ss.7, 13(2), and 26(5); Criminal Justice Act 1925, s.36 (passports).

90. E.g. under the Explosions Act 1875, the Breeding of Dogs Act 1973 and the Guard Dogs Act 1975.

confers, or confers a prerequisite to, some qualification.[91] The offence would have covered organisations which are not part of any statutory scheme. It would not have applied to a deception perpetrated merely to obtain membership of a social club, where a criminal sanction would be neither desirable nor appropriate. In view of the "public duty" limitation, we do not think that any significant gap would be likely to remain in this area if conspiracy to defraud were to be abolished. Most cases of this kind should be adequately covered by other criminal offences; for example, forgery, or obtaining a pecuniary advantage (the opportunity to earn remuneration or greater remuneration in any office or employment) by deception.

(e) Fraudulently obtaining information

4.56 In Withers,[92] confidential information was obtained by deception of those who were under a duty not to disclose it - on the one hand, from banks and building societies and, on the other hand, from government departments. Had the counts relating to the obtaining of information from officials of the Criminal Records Office and the Ministry of Defence (public officials performing a public duty) been charged as conspiracy to defraud (instead of as conspiracy to effect a public mischief) offences might have been disclosed. Obtaining information by fraud, dishonesty or bribe from any official record of persons convicted of offences is specifically penalised by section 9(4) of the Rehabilitation of Offenders Act 1974, if it relates to the conviction of a rehabilitated person. The

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91. This proposal stemmed largely from R v. Bassey (1931) 22 Cr.App.R. 160 in which an unqualified student attempted to gain admission to the Inner Temple by means of forged testimonials and degree certificates.

92. [1975] A.C. 842.

Act does not, however, penalise generally the obtaining of information by deception from an official of the Criminal Records Office, nor is there any provision in the Official Secrets Acts to penalise a person who by deception obtains information controlled by section 2 of the Official Secrets Act 1911. Subject to the possibility that one or other of the offences considered earlier[93] may be applicable in these circumstances, we think that the abolition of conspiracy to defraud might leave a gap in this area. For reasons which we give later, we doubt whether this is the proper context in which to consider fresh legislation penalising generally the fraudulent acquisition of information from a public official.[94]

(f) Obtaining overdraft facilities

4.57 Finally, we suggested in the earlier working paper that, since there was some doubt whether section 16(2)(b) of the Theft Act 1968 penalised the person who merely obtains the right to borrow by way of overdraft, it should be made clear that this conduct was an offence. A trial judge has since ruled that such conduct does fall within the terms of section 16(2)(b).[95] If this decision is upheld, no further provision would be required. If the decision is not followed, a charge of conspiracy to defraud (assuming conduct by two people) would be of no avail because the official granting the facility would normally be exercising a private duty placed upon him and not a public duty. Consequently, if there is any gap in the criminal law in

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93. See para. 4.43 et seq., above.

94. See para. 10.59, below.

95. R v. Watkins [1976] 1 All E.R. 578, per Judge Paul Clarke.

this respect, it would not arise from the abolition of conspiracy to defraud.

Conclusion on non-economic frauds

4.58 We are not aware of any reported cases where charges of conspiracy to defraud have been brought in respect of non-economic frauds since the decisions of the House of Lords in Scott and Withers. Our reexamination has shown that there would appear to be very little dishonest behaviour in this area not covered by any substantive offence which has been treated as criminal in the past which may still be thought deserving of criminal sanctions. There is, however, no offence, apart from conspiracy to defraud, of dishonestly inducing a public official to act contrary to his public duty. Whether there should be such an offence is considered in Part X.[96]

## C. Summary of the possible gaps that would be left in the field of fraud if conspiracy to defraud were abolished

4.59 We are now in a position to summarise the gaps which would be left if conspiracy to defraud were to be abolished. We are especially concerned that those who read the paper should draw to our attention any omissions which we may have made in trying to identify them. Whether and how these gaps should be filled is considered in later parts.

4.60 There would appear to be gaps in the law in the following areas:

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96. See paras. 10.56-10.60, below.

(a) Deceiving a machine, including a computer (para. 4.14).

(b) Gambling swindles (para. 4.41).

(c) Making and supply of material designed to defraud (including commercial counterfeiting) (paras. 4.39 and 4.40).

4.61 Other areas in which there might be gaps in the law are:

(d) The temporary deprivation of property of another, including the use of another's facilities (para. 4.6).

(e) Dishonest failure to pay for goods or services with the intention of delaying or deferring payment (para. 4.32).

(f) Employees dishonestly causing loss to employers by making and retaining a secret profit (para. 4.38).

(g) Fraudulent acquisition of valuable confidential information (para. 4.44).

(h) Certain non-economic frauds (para. 4.58).

4.62 In addition there are two broad areas where abolition of conspiracy to defraud would create unacceptable practical difficulties in prosecuting certain types of criminal conduct:

(i) A false general impression - long-firm frauds (para. 4.19).

(j) Other commercial swindles (para. 4.29).

## PART V

## THE ARGUMENTS OF PRINCIPLE

5.1 There are a number of objections in principle which may be taken to conspiracy to defraud at common law. These are now examined.

### A. Exception to Criminal Law Act 1977

5.2 The first objection in principle to the continued existence of conspiracy to defraud is that it runs counter to the principle established in the Criminal Law Act 1977[1] that an act which is lawful if done by one person should not become unlawful merely because it is agreed to be done by more than one (unless of course some offence (like riot or violent disorder[2]) is specifically formulated to require the participation of more than one offender). Before 1977, an agreement to do an "unlawful", though not criminal, act could amount to a criminal conspiracy, as could an agreement to do a lawful act by unlawful means. As has already been said,[3] there was substantial support for the restriction of conspiracy at common law to the case where the object of the conspiracy is the commission of a substantive offence. Conspiracy to defraud was maintained as a temporary exception pending completion of a consideration of the

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1. Sect. 1.

2. Public Order Act 1986, ss.1 and 2. The essence of these offences is the presence of a particular number of people, and the greater danger of violent acts being done in their presence.

3. See para. 1.3, above.

extent of the offences which would be required in its place.[4]

5.3 Some would argue that an exception should be made for conspiracy to defraud as a matter of policy because of the advantages, largely practical, which attach to this particular offence and because, as has been explained in Part IV, the offence makes criminal conduct by two or more which would not otherwise be criminal if carried out by an individual. This argument, however, does not deal with the question as to why criminality should in the case of certain fraudulent conduct be made to depend upon the involvement of more than one person. Many serious frauds do indeed involve more than one person and the fact that a number of people are involved may be an aggravating factor, but it may be only one of a number of possible aggravating factors against which the seriousness of the criminal conduct is to be measured. Aggravating factors such as this usually affect the length or type of sentence rather than the issue of liability. To put the argument the other way, why should the absence of this particular aggravating factor mean that in some cases there should be no criminal liability at all?

5.4 If some or all of the conduct presently covered only by the offence of conspiracy to defraud is to continue to be penalised by the criminal law, a more principled approach would seem to require that conspiracy to defraud should be abolished and replaced by an offence or offences of fraud capable of being committed by an individual acting alone. In this way, the statutory offence of conspiracy contrary to section 1 of the Criminal Law Act 1977 could, wherever necessary on the facts of a case, be attached to

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4. Criminal Law Act 1977, s.5(2). See also Conspiracy and Criminal Law Reform (1976), Law Com. No. 76, para. 1.16.

the new offence or offences. The main principle established by section 1 of that Act would thus be maintained without, in theory at least, reducing the ability of the criminal law to deal with fraudulent conduct deserving of sanction. However, the necessary price for upholding this principle would appear to be an extension of the criminal law insofar as conduct which was formerly only criminal, if agreed to be done by two or more persons, becomes criminal if committed by one person acting alone. In some cases such an extension may be amply justified; in others it may be argued that the criminal law ought not to extend so far.[5] There is therefore scope for argument as to whether any new offences of fraud which might be created should be broad or narrow in scope. This can only be answered, if at all, after considering the other objections to the common law offence as well as the advantages which are said to attach to it.

B. Offence too wide

5.5 A second argument of principle against conspiracy to defraud is that the offence is too wide. The argument about excessive width has two aspects to it. The first is that the offence is too wide because of the overlap with statutory conspiracy and other substantive offences. The second is that it is too wide because the very broad definitions of the offence mean that it covers certain conduct which arguably ought not to be criminal at all. These issues can be considered separately.

5.6 Conspiracy to defraud embraces almost every offence in the Theft Acts provided the defendant has conspired with another to carry out the conduct in question; the

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5. See further para. 5.5 et seq., below.

definitions put forward in Scott[6] clearly show this to be the case. In principle overlapping offences should be avoided unless there is some reason which makes the overlap acceptable. The objection is stronger, however, where it is not merely a question of overlap but a total subsumption of other offences. Arguably it allows too much discretion to prosecutors as to which charge to bring where either charge would be possible, but where only one of them is desirable in the circumstances. This objection is recognised in the guidance which has recently been issued to prosecutors in relation to conspiracy to defraud.[7] The new guidelines state that "where the essence of the offence is not really fraud at all... it would be wrong to charge conspiracy to defraud relying upon the wide category of offences which loosely include an element of fraud". And if the prosecutor takes the wrong course, it is possible for the trial judge to intervene to prevent any injustice that might occur.[8] Nevertheless, is it wholly satisfactory that this objection of principle should be left to be dealt with in this way by means of prosecutorial guidelines and the intervention of the trial judge? As will be seen in the next Part, it seems that the justification for the overlap in this case is largely pragmatic. Whether this reason is sufficient to make the overlap acceptable is for consideration.

5.7 The second aspect of the objection of excessive width is that conspiracy to defraud penalises conduct which arguably ought not to be penalised at all. The continued existence of the common law offence may in some

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6. Scott v. Metropolitan Police Commissioner [1975] A.C. 819; see para. 2.1, above.

7. [1987] L.S.G. 2666 and see para. 2.9, above.

8. See para. 2.10, above.

circumstances make nonsense of the limitations attaching to a number of existing offences. Where Parliament has given careful consideration to the limits to be placed on conduct which is to be made criminal, it is difficult to justify the retention alongside of an offence whose boundaries (the proof of an agreement apart) go beyond those limitations. It may of course be that some of the limitations upon existing offences should be reviewed. Our discussion in Part IV pointed up the areas where there would be gaps in the criminal law if conspiracy to defraud were to be abolished. We shall be examining in detail later[9] the extent to which the criminal law might be extended to cover these gaps by altering existing offences or creating new ones. It suffices to note at this stage that there are certain areas where provisionally we think that any extension of the existing criminal law would be undesirable.[10]

## C. Vague and uncertain scope

5.8 As the House of Lords in Scott made clear, the definitions put forward in that case were not intended to be exhaustive.[11] Another objection to conspiracy to defraud which may therefore be raised is that because of the uncertain boundaries of the offence it offers insufficient guidance as to what can or cannot lawfully be done and consequently infringes the principle that the criminal law should be knowable in advance of the conduct to be penalised. Arguably, the criminal law should have no place for an offence which is not sufficiently precise that it is possible to say with reasonable certainty whether any

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9. See Part X.

10. See e.g. paras. 10.48, 10.52 and 10.60, below.

11. See para. 2.1, above.

combination of facts constitutes the offence. The objection of uncertainty is one which with varying force can be levelled against almost every common law offence. Although this was certainly a serious objection to common law conspiracy in general, it has been said that "conspiracy to defraud at common law is not badly uncertain in scope and has not attracted serious criticism".[12] Whether in the light of some recent decisions[13] this comment remains true today may perhaps be doubted. The contrary argument that the courts' powers should be flexible enough to deal with new variations in the conduct of fraudsters as they arise will be considered below.[14]

5.9 It may be suggested that any unfairness in the generality of the definition of the offence can be offset by giving the defendant particulars of the case he has to answer. However, this would be to confuse two issues. The principle nulla poena sine lege is intended to ensure that a person may ascertain in advance whether or not his conduct would, if proved, amount to an offence. Particulars, on the other hand, are to help the defendant meet the allegations of fact brought in support of the charge.

## D. Maximum penalty

5.10 A further principle established in the Criminal Law Act 1977 was that the penalties for conspiracy to commit an offence, which were formerly at large, should be limited to the maximum penalty for the offence itself;[15] the same

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12. See Griew, The Criminal Law Act 1977 (1978), General Note to Part I.

13. E.g. Hollinshead [1985] A.C. 975; see para. 4.39, above.

14. See para. 6.9, below.

15. Criminal Law Act 1977, s.3.

principle applies even where the conspiracy consists in an agreement to commit a number of offences. In the Report[16] which preceded the Act, the Commission rejected an earlier proposal (which met with almost universal disapproval on consultation) that where a conspiracy to commit more than one indictable offence of the same nature was established the maximum penalty should be twice that provided for the substantive offence. It was argued that conspiracy charges should in general only be used in cases where the substantive offences have not been consummated and that the maximum penalty for one substantive offence would be entirely adequate.[17]

5.11 Conspiracy to defraud subsumes a wide range of substantive offences. In some cases the maximum penalty for the substantive offence is the same as that which is now provided for conspiracy to defraud, namely ten years' imprisonment; in other cases the maximum penalty for the substantive offence will be significantly lower. The force of the objection to the existence of a higher maximum penalty for conspiracy to defraud than would be available for a statutory conspiracy to commit the substantive offence is less strong now that the maximum for the former is no longer at large, but the objection of principle remains to be answered.[18]

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16. Conspiracy and Criminal Law Reform (1976), Law Com. No. 76, paras. 1.98-1.100.

17. Ibid., para. 1.100.

18. See para. 6.10, below.

## PART VI

## THE PROCEDURAL AND OTHER ADVANTAGES OF CONSPIRACY TO DEFRAUD

6.1 In the last part we identified the arguments of principle which arise in connection with conspiracy to defraud. We now turn to consider pragmatic arguments based upon the procedural and other advantages of a charge of this offence.

### A. The essence of certain fraud cases can be better demonstrated

6.2 An important advantage of a charge of conspiracy to defraud is that it can sometimes better reflect the true nature of the fraud which has been committed than can a charge of one or more existing substantive offences or of a statutory conspiracy to commit one. This advantage stems from the fact that the offence is defined in wide terms which concentrate on the broad objective of the conspirators rather than, as is the case with many offences involving dishonesty, on the means of achieving it.[1]

6.3 We have already referred to some examples of cases where without the availability of conspiracy to defraud it would arguably have been difficult to frame charges of substantive offences which adequately reflected the essence of the fraud. Scott[2] itself is one such case. Charges of corruption of cinema employees would not have gone to the root of the matter complained of, and charges under the Copyright Act 1956 (even with the recently enhanced

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1. E.g. offences of deception under the Theft Acts.

2. Scott v. Metropolitan Police Commissioner [1975] A.C. 819: see para. 2.1, above.

penalties) would not have been appropriate because the case was concerned not only with injury to copyright holders, but also injury to holders of distribution rights. Another is Landy,[3] the Israel British Bank fraud case, where the essence of the wrongdoing was causing loss to the bank's depositors and investors by the abstraction of vast sums of money. Although several existing substantive offences might have been charged instead of conspiracy to defraud, none would have reflected the real nature of the wrongdoing.

6.4 In both the cases mentioned, conspiracy to defraud was a valid charge. A number of cases arising after the decision of the House of Lords in Ayres,[4] at the time when conspiracy to defraud was "for most purposes effectively a dead letter",[5] showed with greater clarity the problems which arise where there is no offence available properly to reflect the essence of the wrongdoing. In some, the only available charges were for substantive offences which covered conduct which was merely incidental to much larger frauds which had been perpetrated.[6] In others, the only available charges were for minor offences committed against a third party, which left the real victims of the fraud unprotected by the law.[7] An example of a case in the former category is Tonner,[8] where the defendants had obtained gold without paying value added tax on it, melted it down and sold it on to bullion dealers who were charged the tax due on the sale. The tax (in this case some £3 million) was not

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3. R v. Landy [1981] 1 W.L.R. 355: see para. 4.28, above.

4. R v. Ayres [1984] A.C. 447: see para. 1.3, above.

5. Arlidge and Parry, Fraud (1985), para. 12.43.

6. E.g. R v. Tonner [1985] 1 W.L.R. 344; R v. Cox and Mead, The Times, 6 December 1984; R v. Lloyd [1985] Q.B. 829; R v. Grant (1986) 83 Cr.App.R. 324.

7. E.g. R v. Pain, Jory and Hawkins (1986) 150 J.P. 65.

8. R v. Tonner [1985] 1 W.L.R. 344.

paid to Customs and Excise. The Court of Appeal, following Ayres but expressing regret, quashed convictions of conspiracy to defraud and substituted convictions for charges of conspiracy to contravene section 38(1) of the Finance Act 1972 (penalising the fraudulent evasion of tax), the maximum penalty for which was then two years (since raised to seven). A charge of conspiracy to defraud would perhaps have better reflected the wrongdoing, in this case the making of illicit gains over and above simple evasion.

B. Presentation of the case may be assisted

6.5 Another advantage of using a charge of conspiracy to defraud in certain types of fraud case, closely related to the last, is that it enables the prosecution to draw up clear and simple charges. This is of particular importance from the jury's point of view. Fraud cases vary widely in their type, size and complexity. Serious fraud cases are invariably tried by judge and jury. Since the tribunal of fact is not chosen for its expertise and its ability to comprehend complex issues but for other reasons,[9] it is obviously important that the presentation of fraud cases by the prosecution is kept as clear and simple as possible. This point has been stressed many times by judges and prosecutors in the fraud context, particularly where the subject of the charge is a sustained course of wrongdoing, involving a complex transaction or series of transactions and a number of defendants, each one of whom may have had different roles to play in the affair from the other. A charge of conspiracy to defraud, which can become, both in function and effect, a charge of several offences, may therefore be helpful in giving the jury the clear, overall picture they require.

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9. See Report of the Fraud Trials Committee (1986), ch. 8.

6.6 In Cox and Mead,[10] for example, Lawton L.J. drew attention to the fact that before 1977 it had been the practice to indict in long-firm fraud cases for conspiracy to defraud. "Explaining the charge to the jury was easy. They would be asked to decide whether the victims had been swindled and, if they had been, whether each of the defendants had been proved to have been a party to the swindle." In Tonner[11] one of the reasons given by counsel for charging conspiracy to defraud was to enable a complicated set of transactions involving a number of possible offences to be presented to the jury more simply. And in Grant[12] the Lord Chief Justice stressed this point, saying:

> "The single count indictment is one which juries can understand. It enables justice to be done expeditiously in a large class of case which is very injurious to the public at large. Indeed in the instant case, it was a single count of conspiracy to defraud coupled with a masterly direction by the learned judge, which enabled the issue to be laid with such clarity before the jury."

In the course of the hearing of the appeal, Counsel for the appellant drew up a "ghost indictment" containing ten counts of conspiracy to commit substantive offences involving dishonesty. The Lord Chief Justice said that because of Ayres the Crown should not have alleged a common law conspiracy to defraud and that trials had become longer, more complex and more difficult for jurors to understand since the decision of the House of Lords. The ghost indictment illustrated this. Now that the full ambit of the offence has been restored,[13] this particular problem can be

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10. The Times, 6 December 1984.

11. [1985] 1 W.L.R. 344: see para. 6.4, above.

12. R v. Grant (1986) 83 Cr.App.R. 324.

13. Criminal Justice Act 1987, s. 12: see para. 1.4, above.

resolved by an appropriately drawn charge of conspiracy to defraud.

6.7 Although the trial of a single conspiracy count may have the desirable effect in some cases of making trials simpler and easier to follow, the counter argument is that excessively wide conspiracy counts, embracing a number of defendants and many transactions, can generate long, complex and expensive trials with the potential for unjust outcomes; this may be particularly so where those who may have been on the fringes of the conspiracy are tainted with the guilt of the main organisers. This is a matter which ultimately has to be left to the discretion of the trial judge. In a case of this sort, he will need to consider whether the interests of justice require the case to be tried on the basis of a number of individual counts (perhaps with separate trials for particular defendants) or on the basis of a broad conspiracy count.

C. Inability to forecast correct offences

6.8 A charge of conspiracy to defraud sometimes helps to avoid demarcation disputes of a purely technical nature which may sometimes arise and lead to criminals being freed because they have been charged with the wrong offence. These events can only tend to bring the law into disrepute.[14] It can also help to overcome the problem which sometimes arises in serious fraud cases where the prosecution are not able to forecast which of two or more substantive offences will be proved, even though their evidence reveals dishonest conduct which calls for an answer. It may be replied that in fairness to the accused the onus should be on the

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14. The problems resulting from the decision in Ayres [1984] A.C. 447 demonstrated the truth of this point clearly. In some cases those who had been convicted of conspiracy to defraud had their appeals allowed on the ground that they had committed some other crime: see e.g. R v. Lloyd [1985] Q.B. 829.

prosecution to get its case in order before, rather than at, the trial. In any event, is this a problem which relates solely to the area of fraud and offences of dishonesty? In cases where there is any real doubt as to which of two or more substantive offences can be proved, it is always open to the prosecution to charge both or all of them. That course has the disadvantage that it may lead to the overloading of indictments which ought so far as possible in the interests of justice to be avoided. A charge of conspiracy to defraud provides the means of doing so.

### D. Flexibility and adaptability

6.9 A further advantage of conspiracy to defraud is that it fills gaps in the law which might otherwise be left if it were abolished. Although the extent of the gaps amongst existing statutory offences which have been identified does not appear to be very great, and most could be filled by extending existing offences or creating new ones as required,[15] it is difficult to be certain that specific, closely-defined offences would cover all the conduct needing to be covered. The way would be open for ingenious fraudsters to fall through the net and avoid the criminal law, whereas a broad offence like conspiracy to defraud covers conduct which is clearly dishonest and in general deserving of criminal sanction but which could not be brought within any of these specific offences.[16]

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15. See Parts X and XII, below.

16. The disadvantages of the "hole and plug" method of drafting legislation are well known in other fields, in particular for example tax law. However, in two recent decisions of the House of Lords in that field a new approach has been adopted to resolve the legitimacy of tax avoidance schemes which involves considering the purpose of the scheme as a whole rather than assessing the legitimacy of each particular transaction which made up the scheme: see Ramsay (W.T.) Ltd. v. Inland Revenue Commissioners [1982] A.C. 300 and Furniss v. Dawson [1984] A.C. 474.

Conspiracy to defraud has an inherent flexibility which can turn one of its most obvious defects - of being too sweeping - to advantage; there is less need to recast the law to meet changes in social behaviour and less need for the judges to make any Procrustean attempts to force the facts of an unexpected case into existing, well understood legal concepts. As we have seen, however, the more principled view is that the criminal law should be certain; changes should be carefully considered, taking into account all points of view, even if this means that a few undeserving rogues escape unpunished.

## E. Maximum penalty

6.10 As we have already stated, the maximum penalty for conspiracy to defraud, formerly at large but now set at ten years, allows the courts, where appropriate, to impose a more severe sentence than might otherwise be available in respect of charges of substantive offences, particularly where a charge of the only available substantive offence does not reflect the overall criminality. It is clear that this has been an important influence in charging conspiracy to defraud in many cases: see for example, Tonner[17] (evasion of VAT), Lloyd[18] (film piracy), Pain, Jory and Hawkins[19] (commercial counterfeiting).[20] Since a conspiracy count may in effect substitute for a charge of several offences, some

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17. [1985] 1 W.L.R. 344.

18. [1985] Q.B. 829.

19. (1986) 150 J.P. 65.

20. While Parliament has since raised the maximum penalties for the relevant substantive offences in the first two cases, in relation to Lloyd the Criminal Law Revision Committee thought that the new maximum penalties under the Copyright Acts "are still hardly adequate for the most serious cases extending over a long period and involving numerous and profitable acts of piracy": see Eighteenth Report, Conspiracy to Defraud (1986), Cmnd. 9873, para. 3.6.

would argue that the punishment imposed on conviction can properly be greater than that available for a single offence. Nevertheless, as we have already pointed out,[21] this argument was rejected in 1977 for the offence of conspiracy generally. The question remains therefore as to why an exception should be made in the case of conspiracy to defraud. Is part of the answer that, since the purpose of fraud is usually to make an illicit profit, arguably there are cases where the profit is so substantial that, coupled with the other circumstances of the case, a long term of imprisonment may be required? The high maximum penalty leaves the sentencer with no greater discretion than he would have in the case of a conviction for theft or obtaining by deception in the Crown Court, offences which may involve facts ranging from the trivial to the very serious.

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21. See para. 5.10, above.

## PART VII

## SUMMARY OF OPTIONS FOR REFORM

7.1 Our present view is that there are three possible alternative approaches to the reform of conspiracy to defraud which might be taken. These approaches differ from one another so far as the range of fraudulent conduct which would be penalised is concerned as well as the shape and structure of the offences created. We put these forward as possible options for reform without at this stage expressing a provisional preference. In addition to these three options, we also include as an option the possibility of retaining the common law offence in its present form.

7.2 The choice, in our view, lies between the following options:

OPTION (A): retention of the present law.

OPTION (B): the creation of a statutory offence of conspiracy to defraud.

OPTION (C): the creation of new discrete offences each concerned with different areas of fraudulent conduct, together with the revision of some existing statutory offences.

A further possible reform - option (C(1) - would be a procedural change involving the existing rules relating to the drafting of indictments.

OPTION (D): the creation of a general offence of fraud capable of being committed by

an individual acting alone. (This option would enable a number of existing offences to be abolished.)

7.3 We examine each of these options in turn in Parts VIII to XII below, considering what changes in the law would be required, as well as the arguments for and against. Although the options are presented as alternatives, it would be possible to combine some of them, or aspects of some of them. However, before discussing the options, there is a general point which we wish to raise concerning our treatment of the question of temporary deprivation.

7.4 As we saw earlier,[1] conspiracy to defraud may be capable of being charged in respect of the temporary deprivation of another's property by dishonest means. By contrast, with a few specific exceptions, temporary deprivation does not suffice for offences in the Theft Acts 1968 and 1978. If, in consequence of the possible scope of conspiracy to defraud, we are to consider the extension of offences involving fraud in the Theft Acts to cover temporary deprivation, but not in relation to other offences (such as theft), it may be argued that this would give rise to an unfortunate anomaly. For this reason, we think that consideration of the whole question of temporary deprivation requires separate treatment: this we give it in Part XIII below. For this reason, when considering the offences proposed in options (B), (C) and (D), it will be necessary to bear in mind that the question how far the criminal law should penalise temporary deprivation will be left open until later.

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1. See para. 4.5, above.

## PART VIII

## OPTION (A): RETAIN CONSPIRACY TO DEFRAUD

8.1 The first option would be to retain (at least for the foreseeable future) the common law offence of conspiracy to defraud. Section 12 of the Criminal Justice Act 1987, which has the effect of restoring the common law offence to its pre-1977 ambit as well as establishing a maximum penalty of ten years' imprisonment for the offence, would remain in place.[1] Control over the use of charges of conspiracy to defraud would be based on the prosecution guidance already issued and by the intervention of the trial judge if it appeared at any stage of the proceedings that injustice might otherwise occur.[2] Some of the suggestions for reform considered under option (C) and (C(1)) could be adopted in any event, but conspiracy to defraud would remain alongside.

### A. The arguments in favour of option (A)

8.2 The advantages of being able to charge conspiracy to defraud as a common law offence are largely pragmatic. They have been considered above[3] and can be summarised as follows:

(i) A charge of conspiracy to defraud can sometimes better reflect the true nature of the fraud which has been committed than a charge of one or more existing substantive offences or of a statutory conspiracy to commit one.

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1. See para. 1.4, above.
2. See para. 2.10, above.
3. See Part VI.

(ii) The presentation of serious fraud cases involving complex transactions can be assisted by a charge of conspiracy to defraud, because it better enables the jury to be given a clear, overall picture than a charge of several offences.

(iii) A charge of conspiracy to defraud can help the prosecution where they are unable to forecast which of two or more substantive offences will be proved, even though their evidence reveals dishonest conduct which calls for an answer.

(iv) The flexibility of the offence means that there is less need to recast the law to meet changes in social behaviour and therefore less likelihood that skilful fraudsters will escape the net.

(v) The high maximum penalty allows the courts to impose an appropriate sentence in each case according to its seriousness and other relevant factors.

B. The arguments against

8.3 Again, the objections to the continuation of the common law offence are based on principle and have been stated.[4] They can be summarised as follows:

(i) It runs counter to the principle established in the Criminal Law Act 1977 that an act which is lawful if done by one person should not become unlawful merely because it is agreed to be done by more than one.

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4. See Part V.

(ii) The offence is too wide (a) because of the overlap with statutory conspiracy and (b) because it covers certain conduct which arguably ought not to be criminal at all.

(iii) The uncertain boundaries of the offence mean that it offers insufficient guidance as to what can or cannot lawfully be done.

(iv) In some cases the maximum penalty for conspiracy to defraud is higher than the maximum penalties for the statutory offences which are subsumed.

8.4 Retention of the common law offence would plainly mark a departure from the policy which we have hitherto followed in our examination of the substantive criminal law that our work is undertaken as part of our programme for systematic reform and codification of the criminal law.[5] Codification in this sense means that all offences which exist by force of the common law should eventually be abolished as common law offences and, if they are to continue to exist, must be reenacted as statutory offences, although not necessarily sharing the same characteristics as the existing common law offence. Do the advantages attaching to this particular common law offence outweigh the disadvantages so as to justify an exception to this policy being made? Can all or most of these advantages be met by the creation of a statutory offence or offences of fraud such as those considered below under the other options?

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5. Second Programme of Law Reform (1968), Law Com. No. 14, Item XVIII.

## PART IX

## OPTION (B): STATUTORY CONSPIRACY TO DEFRAUD

9.1 Under this option, the common law offence would be abolished and replaced by a statutory offence of conspiracy to defraud. The new offence could be defined in accordance with the definitions of the common law offence put forward by the House of Lords in Scott.[1] However, it would be possible to limit the scope of the offence, if desired. One possibility would be to adopt the definition of the general fraud offence suggested as option (D) below,[2] and to make it an offence for a person to agree with another that conduct falling within that suggested definition should be carried out. Because of the width of the existing offence, it would suffer from the same (or a similar) degree of extensive overlap with statutory conspiracy to commit substantive offences; but any possible injustice arising for defendants could be controlled in the same way as the common law offence is now controlled, that is to say by the issue of guidelines to prosecutors and by the intervention of the trial judge, where appropriate. Like the common law offence, the statutory offence could be subject to a maximum penalty of ten years' imprisonment and could be triable only on indictment.

### A. The arguments in favour of option (B)

9.2 Since the statutory offence would in large part mirror the elements of the common law offence, it would share most of the advantages already ascribed above under

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1. [1975] A.C. 819: see para. 2.1, above.

2. See para. 12.4, below.

option (A) to the retention of the existing law. The main advantages would again be pragmatic and need not be repeated.[3] Moreover, the enactment of the offence would not give rise to any immediate need to disturb the offences in the Theft Acts for the purposes of rationalisation (compare option (D)). In addition to these advantages, this option would, unlike option (A), be consistent with our policy of codification; and some of the vagueness and uncertainty associated with the common law offence could be removed.

B. The arguments against

9.3 This option would share most, if not all, of the objections of principle attaching to the common law offence described earlier.[4] In addition, there would be the disadvantage, as compared with option (A), that there would be some loss of flexibility which is an inherent consequence of putting offences into statutory form.

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3. See Part VI and para. 8.2, above.

4. See Part V and para. 8.3, above.

## PART X

## OPTION (C): REFORMING THE PRESENT SCHEME OF OFFENCES

10.1 This option involves looking at the individual gaps in the law which would appear to arise from the abolition of conspiracy to defraud and considering whether they require to be closed at all: and, if so, whether this should be done -

(i) by extending the definitions of terms in existing offences or modifying the conditions of liability: or

(ii) by the creation of new specific offences.

"Closing the gaps" under this option by either method would involve an extension of the criminal law since gaps of this kind only arise where the conspiracy charge makes criminal something which is not criminal when done by a single individual. To create an offence which applies to such an individual therefore necessarily extends the scope of the law.

10.2 If a gap in the law which requires to be closed can be filled by redefining the boundaries of the existing law, in general this is to be preferred to the creation of a new offence. However, it may be inappropriate for all the gaps to be filled in this way since, for example, extending the boundaries of an existing offence to fill a gap may also result in other conduct, not thought to deserve criminal sanctions, being subjected to criminal penalties. In such a situation, the better way to deal with the gap may be to create a specific new offence. These alternatives are explored below in relation to each of the potential gaps in

the law identified in Part IV. We conclude this part by examining the arguments for and against this option.

## A. Deceiving a machine (including a computer)

10.3 We pointed out, at paragraph 4.13, that a person who dishonestly manipulates or "deceives" a machine, such as a computer, in order to obtain valuable services or a pecuniary advantage, or to secure the evasion of a liability, does not at present commit any substantive offence other than (possibly) one of abstracting electricity or, if he agrees to act with another, conspiracy to defraud. Our provisional view is that this is a gap in the law which ought to be filled and that the slight extension involved can be justified. It may be a matter of chance in some cases whether it is an operator of a computer who is deceived or the computer itself. In either case the end result may be the same and it is fraudulent conduct which should be penalised.

10.4 In accordance with the general approach suggested in paragraph 10.1, this particular gap might be filled either:

(1) by an extension of the existing offences in the Theft Acts which involve deception; or

(2) by the creation of a separate offence penalising persons who dishonestly misuse a machine.

The view has been expressed by the Scottish Law Commission,[1]

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1. See Report on Computer Crime (1987), Scot. Law Com. No. 106, paras. 2.5-2.6.

that the old offence of obtaining by false pretences[2] would have been adequate for dealing with cases involving the deception of a machine because the term "false pretences" does not involve any requirement that a human mind be deceived. However, it would probably be undesirable to return to the old law and substitute the term "false pretences" for "deception" since it has an archaic ring and in any event it would serve to narrow the existing offences in a number of other ways. We therefore confine ourselves to an examination of the two courses mentioned.

1. Extending existing offences of deception

10.5 The first course would be to extend the definition of deception in the Theft Acts to cover cases where a machine, rather than any human mind, is deceived. A similar approach has recently been adopted in the case of two other offence-creating enactments. Thus, in relation to forgery and kindred offences the Forgery and Counterfeiting Act 1981 provides, in section 10(3), that -

> "references to inducing somebody to accept a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, include references to inducing a machine to respond to the instrument or copy as if it were a genuine instrument or, as the case may be, a copy of a genuine one."[3]

Similarly, section 39(2C) of the Value Added Tax Act 1983 (inserted by section 12(5) of the Finance Act 1985) provides -

> "The reference ... to furnishing, sending or otherwise making use of a document which is false in a material particular, with intent to deceive,

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2. Larceny Act 1916, s.32(1).

3. This section was relied on in R v. Gold and Schifreen [1987] 3 W.L.R. 803: see para. 4.12, n.21, above.

includes a reference to furnishing, sending or otherwise making use of such a document, with intent to secure that a machine will respond to the document as if it were a true document".

The effect of this provision is to deem a deception to have taken place where false information is fed into a computer.

10.6 Deception is defined in section 15(4) of the Theft Act 1968 as meaning -

> "... any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person".

If this definition were to be extended along the lines of the other enactments mentioned, it might include a provision, such as -

> "inducing a machine to respond to false representations which the person making them knows to be false, as if they were true".

This provision might need to be widened further in order to cover cases where a machine is "deceived" not by false representations (such as making false statements in a document which are to be "fed" into a computer) but by other forms of misleading behaviour (for example, by inserting a false "coin").[4]

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4. We note that in some Codes in the United States of America, the definition of deception has been extended: see, for example, the Alaska Penal Code which provides that:

> "In ... an offence that requires 'deception' as an element it is not a defence that the defendant deceived or attempted to deceive a machine."

Such a provision would be unsuitable in the English context, because it appears to treat matters which are for the prosecution to prove as if they are for the defence.

10.7 The deception offences affected by a change of this kind would be those contained in sections 15, 16, 20(2) of the Theft Act 1968 and sections 1 and 2 of the Theft Act 1978. Sections 1 and 2 both assume the existence of a person who is not merely the victim of the offence but who is also personally affected by the deception.[5] The former section postulates that "the other is induced to confer a benefit on the understanding that the benefit has been or will be paid for"; and the latter refers in subsection (1)(b) to a person who "induces the creditor or any person claiming payment on behalf of the creditor to wait for payment ...". Both these sections would, therefore, require further amendment to ensure that the offences concerned apply to cases where a machine has been deceived. However, we do not put forward any drafting suggestions at this stage.

2. A separate offence

10.8 This would involve the creation of a separate offence potentially covering all cases of deceiving machines but, unlike the deception offences in the Theft Acts, without regard to any specific result of such "deception". Thus, there might be a provision to the effect that it should be an offence -

> "dishonestly to cause a machine to operate knowing that so causing it to operate is contrary to the intentions of the owner or operator".

An offence in these terms would probably cover the particular gap we have identified. However, in doing so it would at the same time extend the criminal law a great deal further than would be necessary or desirable. It would penalise conduct which probably ought not to be treated as

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5. Griew, The Theft Acts 1968 and 1978 (5th ed., 1986), para. 6-15.

criminal: for example, it might cover the secretary who, contrary to staff instructions, types a personal letter at work using an office typewriter. For these reasons, we do not favour the creation of a separate offence, or at any rate one in the terms suggested above.

### 3. Conclusion

10.9 The first approach, namely the extension of the deception offences in the Theft Acts, seems to provide a more satisfactory solution for cases involving the "deception" of a machine than does the creation of a separate general offence. The amendments to the Theft Acts which would be required would be largely technical and, we believe, relatively uncontroversial extensions of the criminal law. We would welcome comments on this provisional conclusion.

## B. False general impression - prosecuting long-firm frauds

10.10 At paragraph 4.19, we concluded that, if conspiracy to defraud were abolished, many cases where the fraudulent conduct involves the creation of a false front, such as in cases of long-firm fraud, could not properly and manageably be presented in court. Although there is very often a deception (or series of deceptions) within the meaning of section 15(4) of the Theft Act 1968 in these cases, prosecutors, it seems, may encounter difficulties in prosecuting cases of this sort by charges of obtaining (or conspiracy to obtain) property or services by deception.

10.11 Another substantive offence capable of being used in many cases of long-firm fraud is fraudulent trading under section 458 of the Companies Act 1985. It is arguable that this offence as it now stands could be used in prosecuting commercial frauds of this kind as a satisfactory substitute for charges of conspiracy to defraud. There are, however,

some situations in which the offence would not at present be a suitable substitute. It is therefore worthwhile exploring whether this offence might be amended to give it a broader role. Before discussing how this offence might be modified, we examine the scope of the offence and its possible shortcomings.

1. Fraudulent trading - the present law

10.12 Section 458 of the Companies Act 1985 makes specific provision for the case where any business of a company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, and penalises any person who was knowingly a party to the carrying on of the business in that manner. The maximum term of imprisonment on conviction on indictment is seven years.[6] A separate offence of fraudulent trading has existed in one form or another since 1928, but before 1981 it could be charged in relation to fraudulent trading only after the company concerned had gone into liquidation.[7] This restriction was removed by the Companies Act 1981.

10.13 Although it appears that neither section 458 (nor its predecessors) have been used frequently in the past, it is said that "prosecutors sometimes use this type of charge as a kind of one-man conspiracy to defraud".[8] As we shall see, there have been several recent cases (some of them

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6. On summary conviction the offence carries a maximum penalty of six months' imprisonment or a fine of the statutory maximum or both.

7. R v. Schildkamp [1971] A.C. 1.

8. Arlidge and Parry, Fraud (1985), para. 12.45.

under the civil provisions[9]) explaining the elements of fraudulent trading.

(a) Fraudulent trading "with intent to defraud creditors...."

10.14 It now seems well settled that fraudulent trading "with intent to defraud creditors of the company or creditors of any other person" requires an element of dishonesty; and that the test of dishonesty given in Ghosh[10] is of general application and therefore applies to this offence.[11] In Grantham,[12] the Court of Appeal approved a judge's direction to the jury that it was possible for them, if they thought fit, to come to the conclusion that the appellant was acting dishonestly and fraudulently if he realised, at the time when the debts were incurred, that there was no reason for thinking that funds would become available to pay the debt when it became due or shortly thereafter: an intent to defraud was established on proof of an intention dishonestly to prejudice the creditors in receiving payment of their debts and it was not necessary to prove an intention that the creditors should never be paid at all.

10.15 It is perhaps arguable, on the basis of Grantham, that an intent to defraud here requires an element of

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9. See now Companies Act 1985, s.630 (formerly s.332(1), (2) and (4) of the Companies Act 1948). See also the new provisions relating to the responsibility for a company's "wrongful trading" contained in s.214 of the Insolvency Act 1986.

10. R v. Ghosh [1982] Q.B. 1053: see para. 2.4, above.

11. See R v. Cox and Hodges (1982) 75 Cr.App.R. 291; and R v. Lockwood [1986] Crim.L.R. 244.

12. R v. Grantham [1984] Q.B. 675.

deception. After referring to Welham v. Director of Public Prosecutions,[13] Lord Lane C.J. stated -

> "In the present case it was open to the jury to find, if not inevitable that they would find, that whoever was running this business was intending to deceive or was actually deceiving [the supplier of goods on credit] into believing that he would be paid in 28 days or shortly thereafter, when they knew perfectly well that there was no hope of that coming about. He was plainly induced thereby to deliver further potatoes on credit. The potential or inevitable detriment to him is obvious."

However, while deception or an intent to deceive may well feature in many cases of fraudulent trading (as it did in this case), it is, in our view, doubtful whether the Lord Chief Justice meant that an intent to deceive is an essential element of intent to defraud.[14]

10.16 The meaning of the phrase "intent to defraud creditors" was also discussed in the civil case of Re Sarflax Ltd.[15] In this case Oliver J. expressly held that where a debtor knew or had good grounds to suspect that he would not have sufficient assets to pay all his creditors in full, the mere preference of one creditor over another did not amount to an "intent to defraud".

(b) Fraudulent trading "for any fraudulent purpose"

10.17 There are no reported cases on the meaning of the phrase "or for any fraudulent purpose". It seems likely that the courts would interpret this phrase as requiring dishonesty, but again unlikely that the presence or

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13. [1961] A.C. 103.

14. Cf. Scott v. Metropolitan Police Commissioner [1975] A.C. 819 and see para. 2.1, above.

15. [1979] Ch. 592.

otherwise of a deception would be relevant except in so far as it may be evidence of dishonesty. It may be that, by analogy with cases of conspiracy to defraud, fraudulent trading under this limb is trading with intent to injure, by dishonesty, some proprietary right of another. Further, it is arguable that, despite the obvious concern in section 458 with financial loss, fraudulent trading "for any fraudulent purpose" need not necessarily involve financial loss, and thus may cover the type of case at present caught by conspiracy to defraud a person performing public duties, for example, where the fraudulent purpose is to deceive a public official to grant an export licence to a company when it is not entitled to one.

10.18 There are dicta which suggest that a director of a company dealing in second-hand motor-cars who wilfully misrepresents the age and capabilities of a vehicle to a customer is not carrying on the business for a fraudulent purpose.[16] However, where such a director tells lies every time he sells motor-cars, it must be doubtful whether these dicta would be followed.[17] It has been suggested that an intent to avoid satisfying a person with a claim for an unliquidated sum (who is not strictly speaking a creditor) could constitute a "fraudulent purpose".[18]

(c) "Carrying on" a business

10.19 The Court of Appeal has held that a single transaction, if carried out in the course of business dishonestly with intent to defraud a creditor, would be

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16. See Re Murray-Watson Ltd. 6 April 1977 (an unreported decision of Oliver J.) and Re Gerald Cooper Chemicals Ltd. [1978] Ch. 262, 267.

17. Cf. Arlidge and Parry, Fraud (1985), para. 9.05.

18. See ibid. and Re Sarflax Ltd. [1979] Ch. 592.

sufficient to constitute the offence.[19] In an earlier case,[20] Templeman J. held that a creditor is a "party" to the carrying on of a business with intent to defraud creditors if he accepts money which he knows full well has been procured by carrying on the business with intent to defraud creditors, for the very purpose of making the payment. In another case,[21] Oliver J. said that the collection of assets acquired in the course of business and the distribution of the proceeds in the discharge of business liabilities could constitute "carrying on" a business for the purpose of the section and thus that it was not restricted to the carrying on of trading activities.

2. Possible shortcomings of the present law

(a) Limitation to company trading

10.20 In 1982, the Committee on Insolvency Law and Practice (the Cork Committee) recommended that "an offence of fraudulent trading adapted from section [458] should be introduced in relation to individuals".[22] The Committee gave no explanation for this recommendation, noting merely that there was much to commend a provision in Australia (under which an offence is committed by a bankrupt who before bankruptcy has contracted a debt provable in the bankruptcy exceeding a specified sum, without having at the time of contracting it any reasonable or probable ground of

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19. See R v. Lockwood [1986] Crim.L.R. 244.

20. Re Gerald Cooper Chemicals Ltd. [1978] Ch. 262. The single transaction in that case involved accepting a deposit from a customer knowing that the goods could not be supplied and using the deposit in a way that made it impossible to repay the creditor.

21. Re Sarflax [1979] Ch. 592.

22. (1982), Cmnd. 8558, para. 1890.

expectation of being able to pay the debt) but saying that they did not wish to go as far as this provision in their recommendation. We note, however, that this recommendation was not implemented in the Insolvency Act 1985 which gave effect to many of the Cork Committee's recommendations.

10.21 As we pointed out earlier,[23] long-firm frauds committed through companies can be prosecuted as fraudulent trading. Although in practice it would probably be unusual for a long-firm fraud to be carried out other than by means of a limited company - personal bankruptcy might otherwise follow - is there any reason in principle why fraudulent trading should be limited to companies? The offence was originally introduced on the recommendation of a committee which was concerned solely with company law to meet a specific situation which had arisen in winding-up.[24] It is true that the situation of limited companies is different from that of individuals, in so far as the former have a limitation of liability which can protect the assets of those who are taking the decisions to carry on the business which is not open to individuals trading as such or in partnership. On the other hand, trading under a false appearance of solvency affects creditors adversely in all cases, regardless of the form of business organisation. The law of insolvency already provides a number of offences for dealing with acts or omissions committed by the debtor prior to the commencement of insolvency proceedings, many of which carry a maximum penalty equivalent to that applicable to fraudulent trading[25] and it may be that the present law of insolvency is not so unsatisfactory as to require an

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23. See para. 10.11, above.

24. See the Report of the Company Law Committee (1926), Cmd. 2657, para. 67; and Leigh, The Control of Commercial Fraud (1982), p. 141.

25. See Insolvency Act 1986, ss.350-362.

extension of the offence of fraudulent trading as the Cork Committee recommended. We would, however, welcome views as to whether such an extension would be desirable.

(b) Offence too wide

10.22 It has been argued that the effect of the Court of Appeal's decision in Grantham may have been to make criminal liability for the offence too wide; that the decision has made the question of criminality depend upon the legitimacy of the risks taken.[26] How, it has been asked, does one distinguish between legitimate and illegitimate risks? "To talk, as did the trial judge and Lord Lane, about funds becoming available to pay the debt when it became due or shortly thereafter seems to exclude trade credit which is increasingly important as a source of corporate finance. Is it right to regard involuntary trade credit as necessarily evidence of dishonesty?" The suggestion has been made that the test should be more flexible as to the time of payment: did the party to the carrying on of the business know that there was no prospect of the debt being paid within a reasonable time after the delivery of the goods or the expiration of any trade credit?

(c) Offence too narrow - should it cover reckless trading?

10.23 The idea of extending the criminal sanction to cover reckless trading was considered and rejected in 1962.[27] The corresponding civil provisions have been

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26. See Farrar, "The meaning of intent to defraud in section 332 of the Companies Act 1948", [1984] J.B.L. 357, 359-361.

27. Report of the Company Law Committee (1962), Cmnd. 1749, para. 503(b).

widened with the recent introduction of the concept of "wrongful trading" under what is now the Insolvency Act 1986.[28] There does not seem to be any support for a comparable extension of the criminal sanction and, indeed, there are strong arguments against doing so.[29]

3. Conclusions

10.24 We should welcome views on whether provisions similar to those contained in section 458 should apply to fraudulent trading by any form of business organisation, whether it be a company, partnership or individual trading alone. (Any such reform could not be achieved by a simple amendment to the Companies Act but only by an offence replacing section 458 and forming part of the general criminal law against fraud.) We would also welcome comments on whether, in respect of the breadth of its coverage, the clarity of its terms and its maximum penalty (seven years), such an offence could be regarded as an adequate replacement for conspiracy to defraud in cases of long-firm fraud.

10.25 So far as other possible changes to the existing offence of fraudulent trading are concerned, we would welcome comments on whether, contrary to our present view -

(a) the offence should be limited to avoid the possibility of penalising traders who rely on involuntary trade credit; and

(b) the offence should be extended to cover criminal liability for reckless trading.

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28. Sect. 214.

29. See Leigh, op. cit., p.147.

## C. Commercial swindles

10.26 We expressed the view in Part IV[30] that, while there would be no obvious gaps in the criminal law in the area of commercial frauds, this was an area where the abolition of conspiracy to defraud would inhibit the prosecution of fraudsters. We deal below with the possible inadequacy of existing penalties for certain offences.[31] The other advantages of being able to charge conspiracy to defraud in this area could not, in our present view, be met by the addition of discrete offences or by the extension of existing offences. Accordingly, apart from suggesting the possible increase of some maximum penalties, we are unable to make any other proposals under this option for dealing effectively with certain types of frauds in this area. We would, however, welcome comments and suggestions as to whether it is thought that further specific offences of fraud would be required in relation to commercial frauds. (We exclude for present purposes the question of the need for a general fraud offence or statutory conspiracy to defraud: clearly, if either were accepted, they would have an important part to play in this area.)

## D. Gambling swindles

10.27 A reform which would seem to be required in this area is a revision and updating of section 17 of the Gaming Act 1845.[32] A new provision might make it an offence for a person dishonestly to affect the outcome of any event upon which anyone stands to lose or gain in money or money's

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30. See para. 4.29, above.

31. See paras. 10.61-10.63, below.

32. Such a proposal was made in Working Paper No. 56 (at para. 66) and met with general approval on consultation.

worth, whether as a participant or by betting on the outcome, or dishonestly to affect the amount which stands to be lost or gained by betting on the outcome of any such game or event, in each case with intent to make a gain for oneself or another, or to cause loss to another. Some provision of this kind would, in our provisional view, be desirable to fill the gap which would be left by abolition of conspiracy to defraud. For a further discussion of the issues raised here, on which we would of course welcome comments, the reader should refer to Appendix B.

## E. Making and supply of material designed to defraud (including counterfeiting)

10.28 We have seen that the decision of the House of Lords in Hollinshead[33] has shown another use to which charges of conspiracy to defraud may be put in circumstances where no other substantive crime (or statutory conspiracy) has been committed. This is where material (in that case a device known as a "black box") is designed with the ultimate object of defrauding but where those designing, making or supplying it are not themselves responsible for exploiting the material so as to give rise to the fraud. We have also seen that a gap would seem to arise in a parallel situation where commercial products are "counterfeited" with a view to the commission of fraud on the manufacturer of the genuine products and on purchasers too. These two types of situation, although similar in a number of respects, are considered separately so far as the possible creation of new offences is concerned.

### 1. Hollinshead

10.29 It is generally accepted that there is no other useful purpose to which a "black box" device can be put

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33. [1985] A.C. 975 and see para. 4.39, above.

other than for committing a fraud on an electricity board. It has been estimated that the electricity supply industry as a whole loses more than £50 million each year through electricity meter fraud.[34] In view of the seriousness of the problem and the harm caused to the public interest, there is a strong case for seeking to ensure that those who facilitate others to commit such frauds by manufacturing, selling or possessing such devices are capable of being made the subject of criminal sanctions. Such persons seem just as much deserving of punishment as those who actually commit the frauds. The gap which would be left here by the abolition of conspiracy to defraud is, in our provisional view, one which requires to be filled.

10.30 There are a number of ways in which the conduct of individuals such as the defendants in Hollinshead might be covered by the criminal law. However, two main approaches can, in our view, be suggested. One way of looking at the conduct is to say that it raises a problem only in relation to fraud. Another is to regard the connection with fraud as largely incidental. On the latter view, Hollinshead and similar cases can be seen merely as examples of a wider mischief, that is to say the making and supply of material for the commission of crimes in general, which may not be adequately covered by the existing criminal law. There are arguments for and against both these approaches. Since our principal concern here is with the offences which would be required in the field of fraud if conspiracy to defraud were to be abolished, we have thought it right to limit our consideration in the body of the paper accordingly.

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34. Jarman, "Electricity Meter Fraud and 'The Black Box'", (1985) 149 J.P. 103. See also Furness, "Catching Current Thieves", (1987) 95 Police Review 1871.

However, we would not wish to ignore the possibility of adopting an alternative, even more broadly based solution not limited to fraud; a discussion of the possible options for reform along these lines will be found in Appendix C.

10.31 Parliament has on occasion intervened to penalise the making, supply or even mere possession of things appropriate for use in crime but unrelated to the commission of specific offences in particular areas where the danger to the public interest is manifest; a number of examples, may be cited:

(i) Offences against the Person Act 1861, section 59 of which penalises the unlawful supply of drugs etc. to procure an abortion;

(ii) Explosive Substances Act 1883, section 4 of which penalises the making or possession of explosives under suspicious circumstances;

(iii) Firearms Act 1968 which penalises the possession of firearms by particular classes of person;

(iv) Restriction of Offensive Weapons Act 1959 which penalises the manufacture, sale, or possession of "flick-knives";[35]

(v) Theft Act 1968, section 25 of which penalises a person who has with him, when

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35. Proposals in the Criminal Justice Bill would extend these provisions so as to outlaw other types of offensive weapons for which there is no legitimate use.

not at his place of abode, any article for use in the course of or in connection with any burglary, theft or cheat;[36]

(vi) Forgery and Counterfeiting Act 1981, section 17 of which penalises making or having custody or control of materials and implements for counterfeiting.

10.32 The narrowest offence which might be devised to cover Hollinshead would be an offence which treated the device concerned as being unlawful, so that anyone who knowingly makes, sells, hires, offers for sale or hire such a device would be guilty of an offence. It is obviously right, as some of the examples quoted illustrate, that the criminal law should on occasion be used for the purpose of outlawing a particular article or product. However, would legislation in such specific terms as these be desirable in the case of a "black box" device? There may be other articles or devices whose sole or main function is for use in connection with the commission of fraud of some kind which on the face of it ought to be treated by the law in the same way, but these would not be caught by such a narrowly drawn offence which, for that reason, would be capable of giving rise to anomalies. Systematic law reform would be enhanced if the proliferation of offences of this kind could be avoided.

10.33 Arguments of this kind lead us to consider the case for having a wider offence which would penalise anyone who makes, sells, hires, offers for sale or hire, or possesses

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36. This offence could be charged in certain cases where an individual has possession of a black box; but it could not be used against a manufacturer or person who merely intends to supply it to a middleman: see R v. James and Ashford (1986) 83 Cr.App.R. 226.

any article which he knows (or believes) is or is likely to be used in the commission of any offence involving fraud. Such an offence would widen the ambit of the criminal law. It would extend the criminal law beyond accessory liability which is dependent on the actual commission of an offence. It would go beyond the present limits of incitement. It would also go beyond the limits of section 25 of the Theft Act 1968 which is restricted to cases where the possessor of the article is not at his place of abode and where the article is intended for use in the course of or in connection with any burglary, theft or "cheat" (that is to say an offence under section 15). The arguments for extending the law in this way are, first, that the public interest in preventing fraud is such that it ought to be possible to penalise conduct which is likely to lend support to the commission of fraud at an early stage before any fraud is committed or actual loss suffered; secondly, that it might be difficult sometimes to prove whether the person found in possession of the article was discovered with it before or after a fraud had been committed; thirdly, such an offence would enable the essence of the accused's conduct to be laid squarely before the jury; fourthly, the risk of anomalies arising from the uneven treatment of conduct which facilitates the commission of fraud offences would be reduced.

10.34 Against these points, it may be argued, on the one hand, that such an offence would be too wide. There is no evidence as yet of any other specific item which gives rise to comparable problems. Nevertheless, the range of articles which <u>might</u> be <u>used</u> in the commission of fraud is infinite. We have suggested that the offence might include the requirement of proof by the prosecution of "knowledge" (or belief) that the article "is or is likely to be used" in the commission of fraud; this may be considered adequate to prevent convictions in cases where the defendant's possession etc. of the article was for an innocent purpose.

One possible limitation might be to exclude from liability the person who merely possesses the article or, alternatively, to require proof in these cases that it was the defendant's purpose to use the device in the commission of fraud. A further limitation might be to confine the offence to articles whose only function is for use in the commission of fraud. However, this limitation would probably be too restrictive because there are unlikely to be many such items which could not be said to have some legitimate use.

10.35 On the other hand, it may be argued that the offence would be too narrow, on the basis that it would be illogical to limit the offence to the facilitation of fraud offences, or to limit it to the provision of an article, and not to cover the provision of advice or other forms of assistance falling short of incitement. But, as we mentioned earlier, these issues really go to the question of the need for a general offence of facilitation (considered in Appendix C) and do not arise from our consideration of conspiracy to defraud.

10.36 We would welcome views on whether it should be made an offence either:

(a) to make, sell, hire, offer for sale or hire a ["black box" device]:

or -

(b) to make, sell, hire or offer for sale or hire, or possess any article which he knows (or believes) is or is likely to be used in the commission of any offence involving fraud.

As regards (b) comments are also invited on whether the offence should be confined to articles which could be used solely for a fraudulent purpose and whether mere possession should be excluded.

## 2. Commercial counterfeiting

10.37 Commercial counterfeiting has become a growing problem in recent years both nationally and internationally. One estimate is that the trade in counterfeit products now accounts for some $60 billion of world trade. There is evidence to suggest that there are strong links between commercial counterfeiters and organised crime and that profits are used to fund drug trafficking. Although a number of offences are available to deal with the problem in certain circumstances, Parliament has not as yet intervened to make commercial counterfeiting a criminal offence *per se*.[37] As we have seen,[38] the abolition of conspiracy to defraud would take away one of the weapons in the existing criminal law which can be used against those who make or supply counterfeit products. The question therefore is whether specific criminal sanctions against commercial counterfeiting should be put in its place.

10.38 Some offences already deal with certain types of counterfeiting, but these are confined to a very small category of items, including in particular coins and banknotes[39] and hallmarks on precious metals.[40] There are,

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37. On 1 December 1986 the Council of Ministers of the EEC adopted Regulation (EEC) No. 3842/86 which lays down measures to prohibit the release for free circulation of counterfeit goods. The Commission intends to examine the adoption of appropriate measures to combat the manufacturing of counterfeit goods and trade within the EEC. This examination is to include the penal legislation of the Member States. The Department of Trade and Industry has been consulting prosecuting authorities to determine and identify any gaps that there may be in existing U.K. legislation: see Hansard (H.C.), 20 March 1987, vol. 112, col. 1194.

38. See para. 4.40, above.

39. Under the Forgery and Counterfeiting Act 1981, Part II.

40. Under the Hallmarking Act 1973.

however, a number of offences which can be used when a commercial product is copied. Thus, the Copyright Act 1956 provides for offences in respect of dealings in items which infringe copyright. The Act was amended in 1982 to extend its protection to sound recordings and cinematograph films[41] and the penalties were substantially increased in the following year in an attempt to stem the huge growth in video piracy.[42] More recently, in 1985, the Copyright Act was extended to cover computer programs.[43]

10.39 The Trade Descriptions Act 1968 contains a number of offences which can be used to help in the control of commercial counterfeiting.[44] However, the Act does not penalise the use of equipment which leads to the application of the false trade description and it has a number of other deficiencies in the context of commercial counterfeiting. This enactment is essentially aimed at consumer protection rather than serious fraud on a large scale and in consequence the maximum penalties are relatively low.[45] Although police investigations are not ruled out in cases involving substantive criminal offences, it is said that in practice the police prefer to leave investigations and prosecutions to trading standards officers.

10.40 So far as general fraud legislation is concerned, the offences under sections 15 and 25 of the Theft Act 1968

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41. Copyright Act 1956 (Amendment) Act 1982.

42. Copyright Amendment Act 1983.

43. Copyright (Computer Software) Amendment Act 1985.

44. For example, s.1 makes it an offence for any person in the course of trade or business to apply a false trade description to goods or to supply or offer to supply goods to which a false trade description is applied.

45. Two years' imprisonment on indictment.

offer some protection. However, section 15 is limited in that it would only apply to the seller of the counterfeit product (or those who aid and abet him) where the deception is sufficient to operate on the mind of the purchaser to cause him to buy the product. Section 25 (going equipped to cheat) penalises certain acts preparatory to an offence under section 15. Although proof of actual deception is not required, it must be shown that there was an intention to deceive purchasers who may be unidentified. Charges under these two sections would appear to be of little, if any, use against the manufacturer of counterfeit products.

10.41 The civil law, though undoubtedly helpful in a number of respects, may not be an adequate deterrent to those carrying on the business of commercial counterfeiting. The remedy of damages for the tort of passing off is only effective in cases where the defendant has the means to pay; and the economic loss suffered by plaintiff manufacturers may well exceed by many times the defendant's available assets. The remedy of an injunction will only be enforceable by the particular plaintiff in whose favour it was given.

10.42 Several arguments can be put forward for dealing with the problem of commercial counterfeiting by means of specific criminal sanctions. The following are among the main arguments in favour:

(1) Although the criminal law deals indirectly with commercial counterfeiting in a number of ways, the existing criminal law is inadequate, in particular in failing to deal with the various stages up to, and including, the manufacture of the product.

(2) The civil law is an inadequate deterrent.

(3) Commercial counterfeiting causes not only loss of profits to the producer of the genuine product, but it also undermines investment costs in design and manufacture. It can reduce public confidence in established markets of branded goods and the other products of the company. The ultimate purchaser may be deceived and defrauded, and if the product is defective it may also lead to injury or ill health with little prospects of redress.

(4) There used to be an offence under section 2(1) of the Merchandise Marks Act 1887 which penalised the forgery of trade marks and the production of implements intended for use in the forgery of such marks, but it was abolished, without replacement, by the Trade Descriptions Act 1968. Equivalent provisions have remained in force in Hong Kong and have been found to be powerful weapons in dealing with the problem of commercial counterfeiting there.

(5) A specific offence or offences would have the advantage of making it clear to all concerned that counterfeiting was a proper concern of the criminal law.

(6) Many other countries have created specific offences to counter the problem.[46]

10.43 We do not at this stage make detailed suggestions as to the creation of an offence or offences to cover

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46. For example, the US Trade Mark Counterfeiting Act 1984 makes it a felony for a person to traffic or attempt to traffic in goods or services bearing a counterfeit trademark.

commercial counterfeiting. We would, however, welcome comments on the following questions:

(1) Should there be a new criminal offence which deals directly with the mischief of counterfeiting products?

(2) Should any legislation apply to all products or should it apply only to particular types of product?

(3) Should it aim to cover forged or counterfeit marks as well as counterfeit products?

(4) Should it aim to cover the making, supply, possession with intent to supply, importation and export of counterfeit products?

(5) Should the mental element for the offence consist of a requirement that the person concerned knows or believes that the product is a counterfeit product or should there be a further requirement that he intends that he or another should pass off the product as genuine (cf. Forgery and Counterfeiting Act 1981, section 14(1))?

(6) Should there be an offence to cover the possession of materials for use in producing a counterfeit product (cf. Forgery and Counterfeiting Act 1981, section 17)?

(7) Would a maximum penalty of seven years' imprisonment be appropriate in the case of an offence triable on indictment and six months' imprisonment in the case of an offence triable summarily?

(8) Should there be ancillary powers of search and seizure beyond those available under the Police and Criminal Evidence Act 1984?

(9) As an alternative to specific legislation aimed at commercial counterfeiting, should the more serious cases be left to be dealt with by general fraud legislation of the kind suggested under options (B) or (D)?

## F. Acquisition of confidential information by dishonest means

10.44 As we pointed out earlier,[47] although it is not in general a crime under English law to steal confidential information (such as commercial or industrial secrets) or to obtain such information by deception, it is arguable that conspiracy to defraud might be charged where there was an agreement to use dishonest means to deprive another of his right to hold confidential information and so cause him financial prejudice. The question, therefore, is whether we should propose any new offence of taking confidential information by dishonest means or an extension of any existing offence or offences in this area. For a number of reasons, we do not think that this paper is the appropriate place to conduct a review of the need for such a sanction.

10.45 The first reason is that the whole area of obtaining confidential information and invasion of privacy is a complex one involving many aspects of both civil and criminal law going far beyond the realms of fraud. For example, the Younger Committee on Privacy in 1972 considered in some detail the problems to which the use of technical surveillance devices gave rise and recommended the creation

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47. See para. 4.42, above.

of an offence of surreptitious surveillance by means of devices of that kind.[48] We ourselves made recommendations in 1981 for a legislative scheme for the creation of a new statutory tort of breach of confidence to replace the present action for breach of confidence.[49] This included a proposal that a person who takes information from another without authority by improper means (for example by deception, or use of a surveillance device) would owe an obligation of confidence in respect of that information to the person from whom it was acquired and could be sued by that person for damages resulting from any breach of that confidence or restrained from using the information or making disclosure of it. Although the Government has indicated that it intends to introduce legislation based on the Commission's recommendations, it will not be given high priority;[50] and it has no present intention of implementing the offence recommended by the Younger Committee.

10.46 The second reason is that, even if there were generally accepted to be the need for a criminal sanction, the scope and definition of any offence would require much greater consideration than we would be able to give it in this paper. If there were to be an offence covering the taking of confidential information any solution to its definition could not, we think, be founded on a simple amendment of the Theft Acts.[51]

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48. See Report of the Committee on Privacy (1972), Cmnd. 5012, Part IIE, ch. 19, paras. 562-563.

49. Report on Breach of Confidence (1981), Law Com. No. 110, Cmnd. 8388.

50. "Since it is essentially a restatement of common law": Hansard (H.C.), 2 February 1987, vol. 109, col. 513.

51. Widening the definition of "property" to include confidential information, as has sometimes been suggested, would be inadequate on its own: a person who "steals" confidential information from another does not deprive that other of the information, he merely

10.47 Thirdly, although such conduct arguably falls within the definition of conspiracy to defraud laid down in Scott,[52] so far as we are aware conspiracy to defraud has never been used in these circumstances. This may be taken to suggest the absence of any pressing need to retain conspiracy to defraud for this purpose.

10.48 For these reasons, we make no proposals in this paper for filling the gap that might be said to arise from the abolition of conspiracy to defraud in relation to the dishonest acquisition of confidential information. It may be that at some future stage the need for criminal sanctions to deal with industrial or commercial espionage should be the subject of examination. We note, for example, that a number of other European countries have for many years had criminal sanctions aimed at such forms of espionage[53] and some might see the need for similar sanctions here. However, if this were ever to be carried out, it would have to be undertaken as a separate exercise and not necessarily by the Commission.

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51. Continued
deprives him of his exclusive knowledge; the fact that the victim may suffer financial loss is irrelevant because that loss is not the same as the loss of the information itself. Cf. the decision of the Ontario Court of Appeal, in R v. Stewart (1983) 5 C.C.C. (3d) 481, that information is capable of being stolen under the theft provisions of the Canadian Criminal Code: see further Appendix A, para. 19.

52. [1975] A.C. 819: see para. 2.1, above.

53. See e.g. Swiss Penal Code, art. 162; French Penal Code, s. 418 (limited to industrial trade secrets). These criminal sanctions are all backed up by more comprehensive civil provisions. Some states in the U.S.A. have also enacted penal provisions concerning illegal disclosure or theft of trade secrets.

## G. Secret profits by employees and other fiduciaries

10.49 We pointed out at paragraph 4.38 above that, in respect of an employee who makes and retains a secret profit from the misuse of his position as employee for which he is accountable to his employer, the abolition of conspiracy to defraud would leave a gap in the law. The same would appear to be generally true of any other person in a fiduciary position (such as a trustee, company director, partner) who dishonestly makes and retains a profit by abusing that position. We examine whether conduct of this kind ought to be penalised regardless of whether one or more persons is involved; and, secondly, if it is to be, what form any offence might take.

### 1. Should there be an offence?

10.50 This question is addressed first not least because of the view of the Court of Appeal that "if in each case of secret profit a trust arises which falls within section 5, then a host of activities which no layman would think were stealing would be brought within the Theft Act ...".[54] Although the Court was solely concerned with the scope of theft, the tenor of the decision seems to be that no layman would regard the making of a secret profit in such circumstances as amounting to a criminal offence at all. Yet, as we have seen, the House of Lords has since said that an agreement to do the same is capable of being charged as conspiracy to defraud. Arguably the availability of recourse to the civil law for an account of profits together with, in the case of the employee, disciplinary action, including for many the almost inevitable prospect of dismissal, are adequate deterrents against such conduct;

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54. Attorney General's Reference (No. 1 of 1985) [1986] Q.B. 491, 503; and see para. 4.34, above.

and, in the absence of any other aggravating feature (such as deception or falsification of accounts) which might justify the bringing of criminal charges under the existing law, there is otherwise no need to resort to the criminal law in cases of this kind. A further reason is that it may be difficult to extend the criminal law this far (particularly in the broader context of persons abusing a fiduciary relationship to make a profit) without reference to complex civil law concepts. It would, for example, probably be undesirable for the civil law concept of the fiduciary duty to be introduced into the criminal law because it would provide too uncertain a base for a criminal offence. We note also that the Criminal Law Revision Committee rejected the idea that it should be an offence for a person (for example, an employee) to take another's property to use for the purpose of profit for himself or that he might be made guilty of appropriating the resulting profit.[55] Although the Committee did not consider the situation where an employee merely misuses his position (as opposed to his employer's chattels) to make a profit, there is no reason to suppose that their view would have been any different had they done so.

10.51 Against these points, a number of arguments can be put as to why criminal liability should be extended. First, it may otherwise be difficult to prosecute individuals such as the train crew in Cooke[56] who may not have committed any other offence. Second, while the Court of Appeal[57] seemed to be concerned that the floodgates would be opened if the provisions in the Theft Act were to be

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55. Eighth Report (1966), Cmnd. 2977, para. 57 (iii).

56. [1986] A.C. 909.

57. Attorney General's Reference (No. 1 of 1985) [1986] Q.B. 491, 503.

interpreted as had been argued, there would always be the need to prove that the defendant was dishonest. If, for example, an employee believed he was entitled, as against his employer, to keep the money that he had earned, the prosecution would have failed to prove that he was dishonest. Third, although the layman might well not regard such conduct as amounting to stealing, it does not follow that the layman would not regard the conduct as a "fiddle" and therefore deserving of some criminal sanction. Finally, although there are civil remedies available, and an employer can also take disciplinary action, these may not be regarded as sufficient deterrents.

10.52 On the general question whether there should be any new offence in this area there are clearly arguments both for and against, but on balance our present view is against. However, our view is provisional and we would welcome comments on where it is thought the balance of the arguments lies.

2. What kind of offence?

10.53 If, contrary to our provisional view, it were to be generally accepted that there is a need for an offence, we are not at this stage persuaded that it would be desirable to create a separate offence aimed at the making of a secret profit by persons in a fiduciary position. The disadvantage of basing an offence on the uncertain civil law concept of the fiduciary duty seems to us to be a sufficient reason in itself for not having such an offence. Equally, we would not be in favour of proposing the reversal by amending legislation of the decision of the Court of Appeal in the Attorney-General's Reference[58] and extending the existing offence of theft for the purposes of covering such

58. [1986] Q.B. 491.

conduct (although in the light of some of the arguments raised by commentators[59] that the Court misinterpreted section 5(1) of the 1968 Act, there may be room for clarification of the scope of the section). There remains, however, the possibility of creating a new offence which relies, not on the concept of the fiduciary relationship, but instead on the relationship of employer and employee or principal and agent. A more limited offence of this kind might be formulated in terms of an employee or agent using his position for gain without the consent of his employer or principal with the result that the latter suffers a loss.

10.54 Defining the elements of such an offence would not be entirely without problems. For example, as regards the question of the employer's consent to the employee's conduct, would it be necessary to show that the employer had expressly forbidden the conduct, or would an implied prohibition suffice? If there was an express term within the contract of employment forbidding the employee doing certain things of which the employee concerned was unaware (because he had not read his contract closely or for some years) should his lack of knowledge be a defence? Should any defence in this respect be based on what the defendant knew or ought reasonably to have known? Should proof of knowledge be a matter for the prosecution to prove rather than the lack of it for the defence? Should the prosecution be required to prove that the defendant acted dishonestly? Should it be necessary to show both that the employee made a gain (for himself or another) and that the employer suffered a loss? Arguably both should be required since the essence of the offence would be the making of a secret profit and depriving the employer of the profit to which he is entitled or causing him loss in some other way. If a choice is required, the fraud on the employer ought

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59. See para. 4.35, n.57, above.

perhaps to be regarded as the more important element requiring to be proved.

10.55 We do not examine the offence in any more detail at this stage, since as we said above we provisionally see no need for it. We would welcome comments on that question as well as on the question of the definition of an offence if it is thought that one is required.

## H. Non-economic frauds

10.56 In the light of our consideration of the area of non-economic frauds in Part IV,[60] the main issue is whether there is any need for new criminal sanctions in place of conspiracy to defraud aimed at anyone who dishonestly induces a person performing a public duty to act contrary to his public duty. For the reasons which we give below, our provisional view is that it would be neither necessary nor desirable to create an offence of this kind.

10.57 Our first reason is that, since the dicta in Scott[61] concerning the existence and scope of this aspect of conspiracy to defraud, we are not aware of any charge of conspiracy to defraud having been brought in these circumstances. It is, of course, possible that such charges have in fact been brought, but that the cases have gone unreported. We would naturally be interested to hear from prosecutors or anyone else who may have information about such cases. However, even if the basis of the first reason turns out to be correct, that in itself is not conclusive.

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60. See paras. 4.45-4.58.

61. [1975] A.C. 819: see para. 4.47, above.

10.58 The second reason, therefore, is that we believe that a substantive offence along the lines suggested above would be too wide and too vague to be acceptable. Our concern is with the concept of "public duty" which was discussed in the earlier part.[62] It would, in our view, be undesirable to include such a concept in a criminal offence without defining it for the purpose of the offence. The problem is that any definition of public duty would be likely to leave the law in this area equally uncertain and elastic. It would not, we think, be satisfactory to incorporate a definition along the lines of the suggested test in paragraph 4.50, above.

10.59 If an offence of dishonestly inducing a person performing a public duty to act contrary to his public duty is likely to be too vague (however public duty is defined) and too wide, the question arises whether there is any other narrower offence in the area of non-economic fraud which might be enacted instead. One possibility might be to have an offence of dishonestly obtaining confidential information from a public official.[63] However, the creation of such an offence would be bound to be controversial, touching as it does on the areas of official secrecy and freedom of information. Moreover, as we pointed out earlier[64] in the wider context of the fraudulent acquisition of valuable confidential information generally, this is not an appropriate place to conduct a review of the need for such a sanction. We therefore make no proposal for a narrower offence of this kind.

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62. See para. 4.50, above.

63. Cf. D.P.P. v. Withers [1975] A.C. 842.

64. See paras. 10.44-10.48, above.

10.60 We would welcome comments on our omission to make any proposals in the field of non-economic fraud in place of conspiracy to defraud.

## I. Raising maximum penalties

10.61 As we have seen charges of conspiracy to defraud are sometimes brought because the maximum penalty for the only available substantive offence is considered to be inadequate to reflect the seriousness of the alleged wrongdoing. Under this option, conspiracy to defraud would be abolished and would not be replaced by a single offence with a high maximum penalty comparable to that now attaching to conspiracy to defraud (ten years). It is therefore for consideration whether, in conjunction with the suggestions made earlier in this Part, the maximum penalties for certain substantive offences might be increased to enable the courts to impose an adequate penalty to meet the worst possible cases particularly where large sums of money are involved. We do not propose here an exhaustive list of offences whose maximum penalties might call for an increase, but the following are suggested as possible candidates.

### 1. Copyright offences

10.62 Cases like Scott[65] and Lloyd[66] involved large-scale copyright swindles on the owners of feature films. The present maximum penalty for breach of the Copyright Act 1956 (as amended) is two years' imprisonment for trial on indictment. A breach of the Act does not necessarily involve fraud, but clearly it may do. The potential scale of the profits for the accused and the losses for the

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65. [1975] A.C. 819.

66. [1985] Q.B. 829.

holders of the copyright suggests that there might be scope for a further increase in the maximum penalty to five, or even seven, years.

2. Fraudulent trading

10.63 The maximum penalty for this offence under section 458 of the Companies Act 1985 was increased from two years to seven years in 1980. If in consequence of the abolition of conspiracy to defraud this offence (or the wider offence suggested above[67] covering fraudulent trading by an form of business organisation) were to play a more significant role in dealing with certain kinds of commercial swindle, there is a case for raising the maximum penalty to ten years.

J. The arguments in favour of Option (C)

10.64 As we have explained, this option would involve the closure of the gaps in the law arising from the abolition of conspiracy to defraud, so far as is necessary, by extending existing offences or creating new specific offences. It would give primacy to the maintenance of a number of important principles of the criminal law. At the same time, this option would overcome the disadvantage which would attach to the retention of the existing law under option (A) or to statutory conspiracy to defraud under option (B): it would accord with the principle established in the Criminal Law Act 1977 that an act which is lawful if done by one person should not be unlawful merely because it is done by more than one.[68] It would thus achieve in relation to conspiracy to defraud what has already been

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67. See para. 10.24, above.

68. See para. 5.2, above.

achieved under that Act in relation to conspiracy generally. Furthermore, criminal sanctions would be imposed only where a clear need had been identified. The boundaries of the individual offences would be more clearly defined than those of the broad offences considered under options (B) and (D). Due notice would be given in advance of the conduct which is to be criminal. It could not be said of this option that too much discretion was being given to prosecutors or to sentencers. Finally, in so far as it would enable conspiracy to defraud to be abolished, this option would accord with our general policy of seeking to codify the criminal law.

### K. The arguments against

10.65 The main argument against this option is that, while all or most of the gaps in the law arising from the abolition of conspiracy to defraud would be filled, it would share few, if any, of the procedural and other advantages attaching to the existing offence. So far as meeting these advantages is concerned, this option has little to offer; only an expanded offence of fraudulent trading would go some way towards doing so. Thus, under this option it would be difficult in certain cases of large-scale fraud for the prosecution to select a charge which properly reflected the true nature of the fraud. The task for the prosecution of presenting complex cases such as these to the jury might be made more difficult. Without conspiracy to defraud (or a general fraud offence) there would be no offence available by which a sustained course of fraudulent conduct could be laid before the jury; the prosecution might need to charge instead a number of separate offences of dishonesty or conspiracies to commit them with the risk of overloading the indictment and confusing the jury. Where the prosecution were unable to forecast which of two or more substantive offences would be proved, they would need to charge all or both and then leave it to the judge to direct the jury as to which charge should be left to them.

## PART XI

## OPTION (C(1)): PROCEDURAL REFORM

11.1 In addition to the changes in the substantive law proposed in option (C), this option would attempt to overcome, at least in part, the principal disadvantage of that option, namely that it does not provide an answer to many of the procedural advantages attaching to conspiracy to defraud. It would involve making a procedural change relating to the drawing and scope of indictments. The main aim of such a reform in this area would be to enable the prosecution in certain fraud cases to render the nature of the conduct alleged to be more easily understood by the jury without the necessity of overloading the indictment.

### A. General deficiency counts

11.2 There is a general rule relating to the drafting of indictments that no single count of the indictment should charge the defendant with having committed two or more separate offences: this is known as the rule against "duplicity".[1] A strict application of this rule can give rise to problems in certain cases: for example, where a person is alleged to have stolen a number of items on different occasions, or at different times and places on the same occasion; or where a large amount of money is alleged to have been fraudulently obtained over a substantial period, but the time or times at which the obtainings took place cannot be shown.

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1. Rule 4(2) of the Indictment Rules 1971 provides: "Where more than one offence is charged in an indictment, the statement and particulars of each offence shall be set out in a separate paragraph called a count."

11.3 The courts have been able to overcome these problems and facilitate the prosecution of cases such as these in a number of ways. One way is to permit a compendious charge of theft where a series of misappropriations may properly be regarded as one continuous appropriation.[2] Another way is to permit a charge of a "general deficiency" where the appropriations or obtainings by deception cannot be split up because the prosecution do not have enough information to prove the dates upon which the appropriations or obtainings were made. It is the latter expedient which requires further examination.

11.4 The authorities on the validity of "general deficiency" counts are for cases arising under the Larceny Act 1916 of theft, embezzlement or fraudulent conversion, but there seems no reason to doubt that the same rules would apply to charges arising under the Theft Acts. In Lawson,[3] the Court of Criminal Appeal held that a solicitor was properly charged that on a day unknown between two dates she had fraudulently converted a sum which represented the aggregate owing to a client at the end of the period. (There were similar counts relating to other clients.) And in Tomlin,[4] the defendant was bound to account on a particular day for monies received by him in small amounts over a period. The prosecution could not show where any individual amount had been taken or what the total deficiency was at any one time. The Court upheld the defendant's conviction for embezzlement of the aggregate amount on a day between the two stock-takings. The Court added in this case that:[5]

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2. See R v. Henwood (1870) 11 Cox CC 526.

3. (1952) 36 Cr.App.R. 30.

4. (1954) 38 Cr.App.R. 82.

5. Ibid., at pp.89-90.

> "We desire to make it plain... that in the ordinary case, where it is possible to trace the individual items and to prove a conversion of individual property or money, it is undesirable to include them all in a count alleging a general deficiency. What we are not willing to do is to elevate a rule of practice, applicable to circumstances where it may be required to avoid injustice, into a rule of law applicable to circumstances where it may defeat justice."

## B. The nature of the problem

11.5 Notwithstanding the Court of Criminal Appeal's comments in Tomlin, the effect of not being able to bring a general deficiency count where it is possible to prove the dates on which individual items were appropriated or obtained may in practice provide difficulties for the prosecution. To take a straightforward example of systematic dishonesty, a person may defraud his employer in respect of travelling expenses. The prosecution can prove the relevant dates and the individual amounts; and there is no problem in drafting a specific charge. On the other hand, his fraudulent behaviour may have continued over a period of months or years and therefore require the laying of dozens or even hundreds of specific charges. It is, however, bad practice to overload the indictment with a multitude of counts. Where two or more persons are involved in a case such as this the prosecution might well wish to include a count of conspiracy to defraud, but that option would not be open to them if the offence were abolished. Where only one person is involved, the usual course would be for the prosecution to charge a small number of "sample" counts. In practice it seems that the defence would be provided with a list of all the similar offences of which it is alleged that those selected as the subject of the counts contained in the indictment are samples. This has the advantage that the trial can be kept shorter, and the jury are not burdened with having to decide guilt or otherwise in relation to a large number of separate counts.

On the other hand, the use of sample counts does have the disadvantage, where the case is contested, that the court does not necessarily hear evidence relating to the totality of the criminal conduct.[6] This may affect the sentence which can properly be imposed. If, after being found guilty of the charges contained in the sample counts, the defendant denies that he committed the other offences which he is alleged by the prosecution to have committed, it seems that the trial judge may not sentence him on the basis that he is guilty of those other offences.[7]

## C. Possible reform

11.6 A possible means of overcoming these difficulties, without causing injustice to defendants, would be to permit the prosecution to allege, in charging a single offence, the total amount of the deficiency over a given period of time even where it has evidence of the individual transactions.[8] Details of the individual appropriations or obtainings could be given in a schedule to the indictment. The defendant and the judge would know precisely, and on the

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6. In some cases the prosecution may introduce evidence of the other instances in which the defendant is alleged to have committed similar offences as evidence of system.

7. See Thomas, Encyclopaedia of Sentencing Practice, para. L.2.1(d) and the cases cited therein. However, some of the cases where sample counts have been charged suggest that, provided the defence are notified in advance, the judge may deal with the matter on the basis that the offence in fact was repeated more than once, or that there were other similar incidents: see e.g. R v. Huchison [1972] 1 W.L.R. 398. This approach conflicts with the principle stated by Lawton L.J. in Wishart (1979) 1 Cr.App.R.(S.) 322 that an accused should be sentenced only for those offences which have been proven against him or which he has admitted.

8. A similar suggestion was raised by the Roskill Committee: see Report of the Fraud Trials Committee (1986), para. 3.16.

face of the indictment, the nature of the prosecution's case and the prosecution would be prevented from shifting their ground during the course of the trial without leave of the judge and the making of an amendment.[9] Where there is a finding of guilt, it would enable the judge to impose a sentence which reflected the totality of the defendant's wrongdoing. Pace the Court of Criminal Appeal in Tomlin,[10] it is difficult to see how such a course can be any less just to a defendant than the case where the prosecution lacks specific evidence as to the dates and times when individual transactions resulting in the general deficiency took place.

11.7 This proposal would obviously not meet all the procedural advantages attaching to a charge of conspiracy to defraud. The prosecution would still need to rely on a charge of an existing substantive offence, such as theft or obtaining by deception. It might, however, help to deal with some of the cases which might otherwise be charged as conspiracy to defraud. This, then, is put forward only as a partial (procedural) solution to the disadvantages of abolishing conspiracy to defraud; and it is a solution which as we have already indicated would need to be coupled with changes in the substantive law. We invite views on this suggestion and would welcome further ideas for procedural changes which might assist in bringing fraudsters to justice.

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9. Cf. Landy [1981] 1 W.L.R. 355.

10. See para. 11.4, above.

## PART XII

## OPTION (D): A GENERAL FRAUD OFFENCE

12.1 Finally, this option would involve the replacement of conspiracy to defraud by a general "fraud" offence capable of being committed by a single individual.

12.2 Although there has never been any general fraud offence in our criminal law, there have been several suggestions in recent times that serious consideration should be given to the creation of one.[1] The Roskill Committee, for example, recommended that this issue should be further examined.[2] There has also been some contemporary academic discussion of the idea.[3] Before examining the arguments for and against, we consider in some detail how such an offence might be defined.

### A. Possible elements of a general fraud offence

12.3 We have taken as our starting point for the definition of a general fraud offence the existing offence of conspiracy to defraud. As we have already seen, that offence has two distinct limbs. The first and more important of the two is concerned with causing an individual to suffer economic loss by depriving him of some property or right corporeal or incorporeal to which he is or would be or

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1. Although this issue was raised in Working Paper No. 56 (at paras. 81-82), the shape and scope of a general fraud offence was not explored in any detail.

2. See Report of the Fraud Trials Committee (1986), paras. 3.14-3.16 and 3.18.

3. See e.g. Sullivan, "Fraud and the Efficacy of the Criminal Law: a Proposal for a Wide Residual Offence", [1985] Crim.L.R. 616.

might be entitled. The second limb is concerned with dishonest conduct calculated to cause a public official to act contrary to his public duty. We explained in Part X why replacement of the second limb by a discrete offence would, in our provisional view, be unnecessary and undesirable.[4] For the same reasons we do not think that it would be necessary to try to take this limb into account in any definition of a general fraud offence. Even if, contrary to our provisional view, there is felt to be a need to replace the second limb of conspiracy to defraud, it would, we think, be better for this to be done by means of a separate offence rather than as part of a general fraud offence. It is therefore only with the first limb with which we shall be concerned in the rest of this Part.

12.4 We propose the following as a possible basic definition of a general fraud offence:

> "Any person who dishonestly causes another person to suffer [financial] prejudice, or a risk of prejudice, or who dishonestly makes a gain for himself or another commits an offence."

We explain below our reasons for suggesting this definition and for leaving out from it certain possible elements. We also consider the place of such an offence in the existing scheme of offences in the Theft Acts. There would clearly be room for more than one approach for dealing with the extensive overlap with other offences. One approach would be to abolish all (or most of) the offences which would be totally subsumed by it. Another approach would be to retain those offences, but to place limitations on the general offence relating either to the definition of the offence or to the procedure to be followed as regards prosecution for it.

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4. See paras. 10.56-10.60, above.

1. The prohibited results

12.5 Since conspiracy to defraud is an inchoate offence it is not necessary to prove that any economic loss actually occurred: an intent to defraud suffices. We have considered four possible prohibited results which might be included in a general fraud offence either individually or as alternatives. These are:

(i) inducing a person to do or refrain from doing any act;

(ii) gain to the defendant (or another);

(iii) loss or prejudice to the victim;

(iv) risk of prejudice to the victim.

For convenience we shall consider (ii) and (iii) together.

(i) Inducing a person to do or refrain from doing any act

12.6 This element was included in clause 12(3) of the draft Theft Bill attached to the Criminal Law Revision Committee's Eighth Report,[5] but that subsection also required proof of deception and an intent to gain for oneself or another. Inclusion of such a result without more would provide an offence far wider than one confined to the protection of economic interests. It would cover conduct not even penalised by conspiracy to defraud. We do not, therefore, consider it further as a possible basis for a general fraud offence.

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5. See para. 3.2, above

(ii) Gain to the defendant (or another)

(iii) Loss or prejudice to the victim

12.7 Most fraud is committed for the purpose of making a gain. Sometimes it is done with a view to someone else obtaining a benefit, but usually it is done for personal gain. There is therefore an argument for having as an element of the offence a requirement that the defendant (or another) made a gain in some way. On the other hand, the concomitant of making a gain is usually that another person or persons suffers a loss. It is the causing of the loss which is the defrauding[6] and this suggests that causing loss to another rather than making a gain has a stronger claim to being the principal basis of any general offence of fraud. Another argument which supports this proposition is the fact that it is often more difficult to prove that a person (the defendant or another) made a gain than that a person suffered a loss. Much time in fraud trials is often taken up with tracing the proceeds of the fraud to the defendant, his relatives or associates. Some of that time might be saved in proving instead that the victim suffered a loss and that the defendant's conduct was the operative cause.

12.8 Faced with a choice between basing the offence on causing a loss or making a gain, there would seem to be advantages in the former. However, both prohibited results might be incorporated as alternatives, so that proof of either result would satisfy this part of the offence. This would make the offence wider than one restricted to causing a loss, because there are circumstances where a person may

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6. "... defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning." per Lord Radcliffe in Welham v. Director of Public Prosecutions [1961] A.C. 103.

fraudulently make a gain without any other person suffering a loss. An example would be where a fraudulent representation is made to a clerk to a local authority planning committee in order to obtain planning permission for a development: neither the clerk nor the local authority would suffer any loss or prejudice, but the person making the representation might obtain a substantial benefit. Is there any reason why such conduct should be excluded from the scope of a general fraud offence? The making of a gain might, therefore, be an alternative requirement of the offence.

12.9 If the causing of a loss or the making of a gain were to be the principal bases of the offence, should they be defined, and if so, how? For the purposes of the Theft Acts:

> " 'gain' and 'loss' are to be construed as extending only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent;
> and -
> (i) 'gain' includes a gain by keeping what one has as well as a gain by getting what one has not; and
> (ii) 'loss' includes a loss by not getting what one might get, as well as a loss by parting with what one has;"[7]

"Property" is defined[8] to include money and all other property, real or personal, including things in action and other intangible property. (Land is capable of being obtained by deception, but can only be stolen in certain circumstances[9]). These definitions of gain and loss effectively confine the terms to economic gain or loss.

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7. Theft Act 1968, s.34(2).

8. In s.4(1) of the Theft Act 1968.

9. Set out in s.4(2).

12.10 There would be no difficulty in adopting the definition of "gain" and "property" for the purposes of a general fraud offence. Consistency with the Theft Acts seems to us to be desirable where possible. As far as the definition of loss is concerned, the question of temporary deprivation is considered separately in the next Part, and we are not concerned with this part of the definition for the moment. As to the remaining part of the definition, this includes causing another not to get what he might get and is therefore similar in scope in this respect to the existing offence of conspiracy to defraud.

12.11 An alternative to the term "loss", and one which might be more appropriate for use in a general fraud offence because of its wider scope would be "prejudice". This term has been used most recently in the criminal law in the Forgery and Counterfeiting Act 1981; the mental element required for proof of an offence of forgery under section 1 is an "intention [on the part of the defendant] that he or another shall use [a false instrument] to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or another's prejudice". The 1981 Act was largely based on the draft Bill appended to our Report on Forgery and Counterfeit Currency.[10] We had considered in that Report whether prejudice might be used undefined, but we pointed out that it was "not a word which in the field of the criminal law has acquired a precise meaning", and we feared that "the use of this word undefined might lead to a series of decisions on the meaning to be given to it, thus defeating one of our objects in restating and clarifying the law."[11] Ultimately, we recommended a definition broadly similar to the one set out in section 10 of the 1981 Act.

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10. (1973) Law Com. No. 55.

11. See ibid., para. 33.

"an act or omission intended to be induced is to a person's prejudice if, and only if, it is one which, if it occurs -

(a) will result -

(i) in his temporary or permanent loss of property; or

(ii) in his being deprived of an opportunity to earn remuneration or greater remuneration; or

(iii) in his being deprived of an opportunity to gain a financial advantage otherwise than by way of remuneration; or

(b) will result in somebody being given an opportunity -

(i) to earn remuneration or greater remuneration from him; or

(ii) to gain a financial advantage from him otherwise than by way of remuneration; or

(c) will be the result of his having accepted a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, in connection with his performance of any duty."

This replaces the requirement under the Forgery Act 1913 of an intention to defraud or deceive and is very similar to the concept of defrauding in conspiracy to defraud, save that section 10(1)(c) refers to "any duty" and is not limited to "public" duties.

12.12 Leaving aside this last element contained in section 10(1)(c), it would be possible to adapt the rest of the definition of prejudice in the 1981 Act for the purpose of a general fraud offence. If the prohibited result were to be defined as "causing another to suffer [financial] prejudice", "[financial] prejudice" for this purpose might be defined as occurring to a person if, and only if, -

(i) he suffers a [temporary or permanent] loss of property; or

(ii) he is deprived of an opportunity to earn remuneration or greater remuneration; or

(iii) he is deprived of an opportunity to gain a financial advantage otherwise than by way of remuneration; or

(iv) someone is given an opportunity to earn remuneration or greater remuneration from him; or

(v) someone is given an opportunity to gain a financial advantage from him otherwise than by way of remuneration.

"Loss" would include not getting what one might get as well as parting with what one has.

12.13 The vast majority of cases of fraud which might fall to be dealt with by the offence would be covered by subparagraph (i). Subparagraphs (ii) to (iv) are less important but they deal with cases which might also be covered by the offence. No doubt further examples of prejudice could be added to the definition if thought necessary or desirable. As in the 1981 Act, it may be considered unnecessary to define "financial advantage".[12]

(iv) Risk of prejudice

12.14 Should the offence extend as far as covering the case where no actual loss or prejudice occurs, but where the defendant's conduct causes another to suffer a risk of

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12. Cf. Theft Act 1968, s.16.

prejudice? This has been held to be sufficient in relation to charges of conspiracy to defraud. In Allsop,[13] for example, it was said that:

> "Interests which are imperilled are less valuable in terms of money than those same interests when they are secure and protected. Where a person intends by deceit to induce a course of conduct which puts that other's economic interests in jeopardy he is guilty of fraud even though he does not intend or desire that actual loss should ultimately be suffered by that other in this context."[14]

In effect the Court of Appeal was saying that economic loss is caused where the defendant induces the victim to take a risk which he would not otherwise have taken. And while the Court here referred to the jeopardizing of the victim's interests by deception, it is clear that this element is not essential.[15] We note also that, in other jurisdictions with a general fraud offence, creating (or intending to create) a risk of prejudice is brought within the offence.[16] A general fraud offence which did not extend this far might be significantly less effective.

2. Dishonest means

12.15 Should it be necessary to prove that the means of causing prejudice or a risk of prejudice involved deception or something akin to deception? Or should the means used merely have to be shown to have been dishonest? The only requirement in conspiracy to defraud at common law is that "the intended means must be dishonest. They need not

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13. (1977) 64 Cr.App.R. 29.

14. Ibid., p.32.

15. See Sinclair [1968] 1 W.L.R. 1246 and Scott v. Metropolitan Police Commissioner [1975] A.C. 819.

16. See, e.g. Scotland (Appendix A, para. 13) and Canada (Appendix A, para. 28).

involve fraudulent misrepresentation".[17] Thus, in Scott,[18] the defendant did not intend to deceive the owners of the copyright and distribution rights, because he did not intend his conduct to come to their attention at all: the dishonest means to be employed were clandestine bribery. Likewise in Cooke[19] the train crew did not intend to deceive British Rail by failing to account for the proceeds of sale from the refreshments. To base a general fraud offence on deception might therefore result in too narrow an offence. A general fraud offence which is intended broadly to reflect the width of the common law offence in this respect could not therefore be limited in this way.

12.16 If, therefore, deception were not to be an essential requirement of a general fraud offence, it has to be asked whether there would be any other way of structuring the offence so that it would not suffer more than is necessary from the disadvantage of excessive width. We have considered the approach adopted by the Canadian Law Reform Commission in this field.[20] In place of a number of existing offences that Commission has proposed an offence of fraud which would be defined as follows:

> "Everyone commits a crime who dishonestly, by false representation or by non-disclosure, induces another person to suffer an economic loss or risk thereof."

On its face the offence would appear to be wider than the offence in section 15 of the Theft Act 1968, since it is not confined to deception, but extends to the inducing of a loss

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17. Scott v. Metropolitan Police Commissioner [1975] A.C. 819: see para. 2.1, above.

18. Ibid.

19. [1986] A.C. 909: see para. 4.36, above.

20. See Appendix A, paras.33-40, where the proposals are more fully described.

"by false representation or by non-disclosure". However, non-disclosure is defined as a -

> "failure to perform a duty to disclose arising from
> (a) a special relationship entitling the victim to rely on the defendant; or
> (b) conduct by the defendant or another person acting with him creating or reinforcing a false impression in the victim's mind or preventing him from acquiring information."

This definition clearly cuts down on what would otherwise be a broad concept of non-disclosure, because it does not, for example, go so far as to say under (b) that mere silence suffices for guilt. A person could be guilty only where he is under a duty to disclose and he fails to perform that duty. A duty to disclose would arise either from a special relationship (for example, a solicitor/client relationship) or from conduct creating or reinforcing a false impression in the victim's mind. It is doubtful whether the combined effect of the concepts of false representation and non-disclosure are very much wider than the concept of deception (as defined and interpreted by the courts) under English law.

12.17 We have been unable to devise any satisfactory formula which is significantly broader than deception (or the proposed Canadian equivalent just described), but which is narrower than the approach of conspiracy to defraud of covering any dishonest means. A general fraud offence might therefore have to follow the wider (dishonest means) path.

12.18 We are aware of the criticisms that have been made in some quarters of the present law on the meaning of "dishonesty". Indeed, the Roskill Committee recommended that these criticisms should be examined.[21] This may have

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21. Report of the Fraud Trials Committee (1986), ch. 3, Recommendation 13.

given rise to expectations that we would be examining these criticisms further in the present context. However, there are a number of offences, in the Theft Acts and elsewhere, which include dishonesty as an essential element and a general review of these offences is outside the scope of our present work.[22] It would, in our view, be undesirable for the term to be defined differently for separate offences, particularly bearing in mind that a single indictment may include separate counts charging several different offences involving this element. In any event our provisional view is that dishonesty (at least for the purposes of the offences under discussion in this paper) is probably best left undefined.

12.19 We considered whether, as an alternative to the term "dishonestly", the general offence might use the term "fraudulently" as a means of avoiding some of the difficulties which have arisen in connection with the former. Fraud after all is the essence of the offence under consideration. The phrase "fraudulently and without a claim of right being made in good faith" appeared in the definition of larceny but was rejected for inclusion in the offence of theft by the Criminal Law Revision Committee in favour of "dishonestly" because:

> "'Dishonestly' seems to us a better word than 'fraudulently'. The question 'Was this dishonest?' is easier for a jury to answer than the question 'Was this fraudulent?' 'Dishonesty' is something which laymen can easily recognise when they see it, whereas 'fraud' may seem to involve technicalities which have to be explained by a lawyer."[23]

Likewise in relation to the deception offences, the term "dishonestly obtains" the property was used in place of

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22. See para. 1.10, above.

23. Eighth Report (1966), Cmnd. 2977, para. 39.

"with intent to defraud, obtains" in section 32(1) of the Larceny Act 1916.

12.20 The term "fraudulently" in the Larceny Act gave rise to remarkably little case law and, in the case of larceny, appears to have added nothing distinct from "without a claim of right being made in good faith". Elsewhere, "to defraud" was said by Buckley J.[24] to mean "to deprive by deceit: it is by deceit to induce a man to act to his injury", but it has since been made clear that this is not an exhaustive definition and that deception is not an essential part of it.[25] Although at the present stage for reasons of consistency with other offences our preference would be to include dishonestly in a general fraud offence, there is arguably a case for using instead the term "fraudulently" on the basis that in the cases of fraud that arise most people would be likely to understand what it means and that its use in the context of a fraud offence would be more appropriate. However, for the avoidance of doubt, it might be necessary to make it clear that the term is not to be interpreted as importing a requirement of deceit. We would welcome views on the desirability of using the term fraudulently and, if it is to be used, on whether and how it should be defined.

3. The mental element

12.21 Apart from the element of dishonesty, the question arises whether there is a need for any further mental element. It has been suggested that an "intent to gain for himself or another" would be an essential element "to underline the cupidity which motivates large-scale

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24. In Re London and Globe Finance Corporation [1903] 1 Ch. 728, 732-733.

25. See Scott [1975] A.C. 819.

frauds".[26] To reinforce the connection between the intended gain and the actual loss, he suggests a requirement that the defendant "foresaw the probability that his conduct would cause loss." However, might not a further mental element beyond the need to show that the defendant was acting dishonestly be unduly limiting for a general fraud offence?

4. The consequences of a general fraud offence upon existing offences

12.22 We have already indicated that an offence of fraud defined in the way set out in paragraph 12.4 would subsume a number of existing offences. We now turn to consider which offences in the Theft Acts would be subsumed, and might therefore be abolished, if such an offence were to be enacted.

(a) Theft (Theft Act 1968, s. 1) and theft-based offences

12.23 Although a general fraud offence would probably be wide enough to embrace all cases of theft, we do not suggest that theft should therefore be abolished. It is obviously necessary and desirable to retain theft as a separate offence if for no other reason than the fact that it reflects a definable category of conduct which the ordinary person recognises as a distinct form of dishonest conduct deserving criminal sanctions. The same goes for offences related to theft, such as burglary, robbery and handling, which in any event would not be completely subsumed by fraud.

12.24 We have considered whether there might be a way of avoiding a complete overlap between theft and the fraud offence. One possibility might be to base the distinction

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26. Sullivan, (loc. cit., n.3, above), at p.624.

between the two, as in the case of the Canadian Law Reform Commission's most recent proposals, on whether the consent of the victim was given. In theft there would be a specific requirement that the appropriation be without consent, whereas in fraud consent is given but it is obtained by deception. However, this approach would involve a possible reconstruction of the offence of theft,[27] which would be beyond the scope of the present project and, in any event, we have already suggested that deception should not be a requirement of the fraud offence.

12.25 An alternative way of avoiding a complete overlap (which would not involve any alteration to the offence of theft) would be to adopt a solution similar to that used in relation to theft and handling. Section 22 of the Theft Act 1968 provides that handling of stolen goods can occur only "otherwise than in the course of the stealing"; thus, an accused cannot be guilty of both theft and handling in relation to the same property. Although there is a strict distinction between the offences, it does not appear to cause problems in practice, because, where appropriate, alternative counts of theft and handling may be charged, or the indictment may be amended, if the need subsequently arises and no injustice would be done. Thus, in relation to the possible general fraud offence a provision might be included which would preclude conviction of fraud where the relevant conduct constitutes the offence of theft. In the event that the prosecutor was uncertain whether on the available evidence the conduct amounted to theft or fraud,

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27. However, an unauthorised act may already be a requirement of appropriation in theft: see R v. Morris [1984] A.C. 320 where the House of Lords said (at p.332) that "the concept of appropriation [does not involve] an act expressly or impliedly authorised by the owner ...". Cf. the earlier decision of the House of Lords in Lawrence v. Metropolitan Police Commissioner [1972] A.C. 626 where it was said (at p.632) that appropriation need not be "without the consent of the owner".

it would be open to him to charge in the alternative.[28] We invite views on this possible way of dealing with the overlap between theft and a general fraud offence.

(b) Obtaining property by deception (Theft Act 1968, s. 15)

12.26 This offence would be totally subsumed and could, for this reason, be abolished. "Fraud" would be wider in so far as (a) proof of deception would not be required, (b) it would extend to the causing of a loss to the victim without resulting in some obtaining of property by the defendant or another and (c), if temporary loss is included (see Part XIII), there would be no need to show an intention permanently to deprive. Section 15 is structured on the basis of the obtaining of a benefit (property) rather than the causing of prejudice. Even if "fraud" were to be limited in this way (and did not extend to making a gain),[29] it would appear that in all cases falling within the section the causing of prejudice or loss to someone (not necessarily the owner of the property obtained) would be the concomitant of the obtaining of property: the case for abolishing section 15 would, therefore, be unaffected.

(c) Obtaining a pecuniary advantage by deception (Theft Act 1968, s. 16)

12.27 This offence would be totally subsumed and could also be abolished. "Fraud" would be wider in so far as (a) proof of deception would not be required, (b) the limitation

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28. Although the result might appear to do for fraud what the decision in Ayres did for conspiracy to defraud, the parallel is not exact because in the case of the common law offence the extent of the exclusiveness was general in that all other offences were excluded; whereas all that is suggested here is that a person could not be convicted of fraud where his conduct amounted to one other offence, namely theft.

29. See para. 12.7, above.

in relation to the obtaining of an opportunity to earn remuneration or greater remuneration that it must be "in an office or employment" would be removed, and (c) the term financial advantage would not be limited as is pecuniary advantage to the cases set out in section 16(2)(b) and (c).

12.28 Like section 15, section 16 is also structured on the basis of the obtaining of a benefit (pecuniary advantage) rather than the causing of loss or prejudice (or the risk of prejudice). Even if the fraud offence were to be limited to the causing of prejudice, it would not result in any narrowing of the criminal law. Indeed, it may be thought that the causing of financial detriment better reflects the real essence of much of the conduct which has been held to fall within section 16.[30]

(d) Procuring the execution of a valuable security (Theft Act 1968, s. 20(2))

12.29 This offence overlaps with the fraud offence but would not be subsumed by it. Section 20(2) itself overlaps with the other deception offences in the Theft Acts, but extends further and penalises conduct which may only be preparatory to the commission of one of the other offences. Since there would be a residue of conduct currently falling within the section which would not be embraced by a charge of "fraud" (or an attempt), it would probably be necessary to retain the offence.

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30. For example, it has been held that a person is "allowed to borrow by way of overdraft" when he presents a cheque supported by a cheque card causing his account to be overdrawn, even though the bank may have refused permission for an overdraft, and is only prepared to reimburse the paying bank to protect its own reputation as well as to comply with its contractual obligation owed directly to the paying bank. It may be preferable to view the defendant's conduct as a fraud on his own bank by dishonestly causing that bank to become indebted to the paying bank, rather than to adopt the interpretation of the words of section 16 quoted.

(e) Obtaining services by deception (Theft Act 1978, s. 1)

12.30 The width of section 1 is such that there is already a considerable overlap between that offence and the section 15 offence. However, the overlap between this offence and "fraud" would not appear to be complete. Although many cases of obtaining services by deception would also amount to "fraud" (because the provision of the services may result in the provider suffering a financial loss or in the defendant making a gain as defined), some cases would not be covered. It is not, for example, a requirement of the offence that the deception must relate to the fact or prospect of payment being made; the deception may relate to any matter. Nor need the defendant be required to act with a view to gain or an intent to cause loss. It has been pointed out[31] therefore that a 17-year-old who misrepresents his age in order to gain admission to a cinema to view a film with an "18" classification, or a person who induces another to let him have the hire of a car by falsely stating that he has a driving licence, assuming dishonesty in each case, commits the offence. In any event, it seems that the essence of the offence under section 1 is different from that envisaged for the general fraud offence. For this reason this offence would need to be retained.[32]

(f) Evading liability by deception (Theft Act 1978, s. 2)

12.31 This offence would appear to be totally subsumed by the general fraud offence and could therefore be considered as a candidate for replacement. The essence of the offence is the evasion of some existing or prospective liability to

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31. See Griew, The Theft Acts 1968 and 1978 (5th ed., 1986), para. 7-14.

32. We note that the Canadian Law Reform Commission has recommended the provision of a similar offence alongside a general fraud offence: see Appendix A, para. 38.

make payment. In each case falling within the section the victim would suffer either prejudice or the risk of prejudice. For example, under section 2(1)(a), a debtor who persuades his creditor by a deception to let him off the debt (or part of the debt) altogether causes another to suffer "prejudice": the fact that the creditor's agreement to this is not binding and therefore may gain the debtor only temporary relief if the fraud is uncovered (conduct within section 2) would not prevent the conduct from amounting to prejudice because the debtor would have been "given an opportunity to gain a financial advantage from [the creditor]".[33]

(g) Making off without payment (Theft Act 1978, s. 3)

12.32 Again, this offence would be totally subsumed by the "fraud" offence. In every case falling within the section where a person has made off "without having paid as required or expected and with intent to avoid payment of the amount due", that person would cause the victim to suffer prejudice, that is, a loss of property.

12.33 To summarise then, we believe that the following offences could be abolished if there were to be a general fraud offence of the kind envisaged:

Theft Act 1968, section 15
Theft Act 1968, section 16
Theft Act 1978, section 2
Theft Act 1978, section 3.

5. Possible limitations on a general fraud offence

12.34 The existing general fraud offence (conspiracy to defraud) is constrained by the requirement of proof of an

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33. See para. 12.12, above.

agreement by two or more persons to pursue the relevant course of conduct. As noted earlier,[34] guidelines have been issued to prosecutors on the use of charges of conspiracy to defraud and judges are expected to intervene if injustice might otherwise occur in continuing with such a charge. In this section, we consider whether these or any other restrictions (procedural or definitional) might be placed on a general fraud offence. This approach offers an alternative to the approach described above of abolishing a number of existing offences. Three possible restrictions will be examined:

- D.P.P.'s consent
- Monetary limit
- A rule of practice - judicial control

(a) D.P.P.'s consent

12.35 If the fraud offence were to replace several existing offences and to play a truly general role in the prosecution of those who commit fraud, it would be impracticable to have a requirement of the consent of the Director of Public Prosecutions to prosecute. However, it has been suggested[35] that, by means of a consent provision, it might be possible to limit the use of a general fraud offence otherwise drawn in wide terms, and in effect to create a residual fraud offence.[36] Adopting this approach would mean that the existing offences in the Theft Acts would remain. By relying on the exercise of the D.P.P.'s discretion charges of "fraud" might effectively be limited

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34. See paras. 2.9-2.10, above.

35. See Sullivan, (loc. cit., n. 3, above), at p.623 et seq.

36. Under the Prosecution of Offences Act 1985, the power to give consent is devolved to Crown Prosecutors, but they must act in accordance with any directions given by the Director: see s.1(7).

to those cases where the defrauding was on a large scale and where the prosecution for a substantive offence (or series of substantive offences) would fail to reflect the gravamen of the offence, or cases not involving the commission of any other substantive offence or where such an offence could only be identified with difficulty. The D.P.P. could be expected not to resort to the offence in minor fraud cases or simply for the purpose of avoiding the need to prove certain elements in other offences where those offences are entirely appropriate.

12.36 Fraud prosecutions are of course undertaken by a number of different agencies, aside from the Crown Prosecution Service under the D.P.P., including H.M. Customs and Excise, the Board of Inland Revenue and the Department of Trade and Industry.[37] It would be costly in terms of delay and resources if these agencies were required to refer cases to the D.P.P. each time they wished to prefer charges of fraud. We do not think therefore that a requirement of consent offers a practicable solution even for a residual fraud offence. As an alternative to a formal consent provision, reliance might be placed on guidelines for Crown Prosecutors.[38] This would at least have the advantage that they could be brought to the attention of other prosecuting authorities.

(b) Monetary limit

12.37 It has been suggested[39] that a further way of restraining a broadly defined fraud offence would be to have

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37. The Serious Fraud Office established under the Criminal Justice Act 1987 for investigating and prosecuting the most serious and complex cases involving fraud will be another.

38. See para. 2.9, above.

39. Sullivan, (loc. cit., n.3, above), at p.624.

a provision limiting prosecutions under it to cases where the person to be charged had committed or was a party to the commission of a fraud, or a series of related frauds, which caused loss in excess of £5,000 or which would (or might) have caused such loss if the fraud or series of related frauds had been carried out as intended. The offence would "become effectively, if not definitionally, a white-collar crime." Clearly it would overcome one of the disadvantages of a general fraud offence, namely the danger of it covering trivial conduct. The majority of specific offences of dishonesty would continue to be prosecuted under the appropriate head.

12.38 Although monetary limits have been used for the purpose of determining the available mode of trial for particular offences,[40] there is no precedent in the law of England and Wales for such a provision being used as a means of determining the cut-off point for criminal liability. This suggestion is open to the objection that it is not always easy to quantify the loss suffered in financial terms and that any limit is bound to be arbitrary. It may give the impression that the law is less concerned with losses brought about by dishonest means below the specified limit. It would also mean that some of the gaps in the law which would be left by the abolition of conspiracy to defraud would only be partially filled. There have been cases where the common law offence has been charged where it was the only appropriate charge and where the loss suffered was less than £5,000. These reasons cause us to doubt whether the suggestion is desirable, but we would welcome views.

(c) A rule of practice - judicial control

12.39 Any general fraud offence ought not to suffer from

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40. E.g. criminal damage: Magistrates' Courts Act 1980, s.22 and Sched. 2, para. 1.

the kind of limitations which the Criminal Law Act 1977 and the decision in Ayres imposed upon conspiracy to defraud. To avoid the rigidity of such an approach, it might be possible to devise a rule of practice which would retain some of the benefits of a general fraud offence and would at the same time deal with the problem of comprehensive overlap with other offences. If on a charge of the general offence it later transpired that the conduct was capable of being charged as another substantive offence, the court could be empowered to direct an amendment of the count accordingly, or to quash the count on the general offence, if justice and convenience required it. If no objection were made and no direction given, the conviction on the general offence would stand, provided it was otherwise regular and in order. By requiring the judge to exercise his discretion as, for example, he is now with reference to separate trials of counts or of defendants, no injustice would be done to the defendant, since he would not be taken by surprise and the particulars of the charge would be known to him. At the same time, if justice required the retention of the count relating to the general offence because, for example, it more appropriately reflected the nature of the conduct at issue, this could be secured and the rigidity of the Ayres approach avoided. We would welcome comments on this suggestion.

6. Mode of trial

12.40 Whether a general fraud offence should be triable only on indictment (as with conspiracy to defraud) or triable either way (as with most other offences involving fraud) would to some extent depend on the purpose of the offence. If it were to provide an offence which is aimed only at very serious fraud cases (supplementing but not replacing the existing statutory offences), there is an argument for making the offence triable only on indictment. On the other hand, if it were to have a wider object the

offence should be capable of being tried either in the Crown Court or in a magistrates' court.

12.41 If the offence were to be triable either way, is there, nonetheless, a case for providing in addition that where the loss suffered is below a certain monetary limit the offence should be triable only summarily? A similar idea has been considered more than once before in relation to cases of low value theft. The James Committee in 1975[41] proposed that all thefts, and related offences of dishonesty, involving property to the value of £20 or less should be triable only summarily unless they were part of a series of similar offences or were thefts from the person of the victim. However, Parliament rejected the proposal in 1977.[42] More recently, the Government last year proposed that, subject to the availability of a special procedure to deal with exceptional cases, there should be a presumption that offences of dishonesty involving property of less than a specified value should be tried summarily.[43] In the event, the Government decided not to pursue the proposal in the Criminal Justice Bill.

12.42 There remains concern about the increasing pressures on the Crown Court and the still serious delays in bringing cases to trial there. There are no statistics (so far as we are aware) of what proportion of fraud cases tried in the Crown Court are in respect of fraudulent gains to the value of less than, say, £50, though our impression is that it is likely to be not insignificant. In such minor cases the magistrates' powers of sentence would

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41. Report on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts (1975), Cmnd. 6323.

42. Provisions to implement the proposal were included in the Criminal Law Bill.

43. The Distribution of Business between the Crown Court and Magistrates' Courts (Home Office, 1986).

invariably be more than adequate. We would be interested to have views on whether it would be desirable for there to be a provision for cases of fraud involving gains or losses below a small monetary limit to be triable summarily only, as a contribution towards reducing the pressures on the more serious cases which ought to be the main concern of the Crown Court.

7. Maximum penalty

12.43 As we point out below,[44] one of the advantages of a general fraud offence would be that, provided the maximum penalty is sufficiently high, it would enable the courts to impose a penalty which properly reflects the seriousness of the conduct, particularly where a charge of the only available substantive offence would fail to reflect the reality of the wrongdoing. We considered whether a maximum of fourteen years would be appropriate for the worst cases of fraud, but we take the view that it would be too high. At that level it would be out of line with other comparable offences such as theft, obtaining property by deception and would be higher than the maximum penalty recently thought by Parliament to be adequate for conspiracy to defraud. A maximum penalty of ten years' imprisonment would seem to be more appropriate for a general offence of fraud when tried on indictment.

B. The arguments in favour of option (D)

12.44 As we have explained, this option would involve the replacement of conspiracy to defraud by a general fraud offence capable of being committed by a single individual. As with options (B) and (C), this would provide a means of filling the gaps in the law arising from the abolition of

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44. See para. 12.44, below.

the common law offence; it would accord with the principle established in the Criminal Law Act 1977 that an act which is lawful if done by one person should not be unlawful merely because it is done by more than one; and it would accord with our general policy of seeking to codify the criminal law. The general fraud offence would enable the main disadvantage of option (C) (that it would not share the procedural and other advantages of the common law offence) to be overcome, not as in the case of option (C(1)) by procedural means, but rather by an alteration and extension of the substantive law. However, the conduct covered by the offence would arguably be generally accepted as being wrong and deserving of being made the subject of criminal sanctions. Moreover, experience of prosecuting large-scale frauds after the decision in Ayres has shown that fraudsters cannot always successfully be prosecuted if only discrete offences are available. To a large extent therefore rejection of option (D) in favour of option (C) would be acceptance of not being able to prosecute all complex frauds to conviction. Combatting fraud is of course essential to ensure the trust which is the basis of satisfactory business. This is of particular importance to a trading and business nation such as England and Wales.

12.45 The provision of a wide offence with a relatively high maximum penalty would meet the problem that in serious fraud cases the maximum penalties available may not always be adequate. It would also enable the full facts to be placed before the jury and, where relevant, the sentencer. Unless it was thought desirable merely to create a residual fraud offence, the creation of a broad fraud offence might be tied in with the abolition of some of the existing offences of deception in the Theft Acts 1968 and 1978. Arguably the present fraud offences are too complicated and subtle. Some rationalisation and simplification of the law in this area might therefore be achieved just as has occurred in other areas of the criminal law where broad offences have been enacted in recent years.

## C. The arguments against

12.46 The main argument against a general fraud offence of the kind suggested above is that it would be contrary to a number of important general principles of the criminal law.

### 1. Scope of the offence unclear

12.47 Most commercial activity is carried on with a view to gain for its perpetrators or financial prejudice to others, so that in practice the definition of the offence would rely upon the magistrates' or jury's interpretation of "dishonestly". An offence defined in this way would offer insufficient guidance in advance as to what could or could not be lawfully done. This argument was used against clause 12(3) of the Theft Bill in 1968.[45] It is true that the criminal law already contains a number of broadly defined offences, examples of which are theft, obtaining property by deception and criminal damage: they are all basic "either way" offences which carry maximum penalties of ten years' imprisonment. The fraud offence, however, would be wider than the first two, without any requirement of the principal element which in these offences indicates the criminal character of the conduct penalised, namely appropriation or deception. As regards criminal damage, the nature of the conduct, damaging property of another, is sufficiently clear in its meaning as an indication of the penalised conduct to justify the single offence with a high penalty. As mentioned above,[46] the provision of particulars to the accused of the case he has to answer may not be sufficient to offset the unfairness in the generality of the definition.

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45. See para. 3.4, above.

46. See para. 5.9, above.

2. Unnecessary and undesirable widening of the criminal law

12.48 It is generally recognised that criminal sanctions should be imposed only in clear cases of need. Any broadening of the criminal law by the offence of fraud would be designed not only to deal with the gaps in the law but also to overcome the practical disadvantages left by the abolition of conspiracy to defraud. Under this option the extension of the criminal law would be considerable, and it can be argued that such an extension cannot adequately be justified.

12.49 In relation to the gaps arising in the law, it may be said that option (C) (discrete offences) would extend the law as far as it is necessary to do so on that account. It follows that the major justification for extending the law any further than under that option lies in relation to the procedural advantages. It is arguable that these are inadequate reasons on their own for making criminal that which would not be criminal without the inclusion of other ingredients, such as deception. Several thousand cases of obtaining property by deception are prosecuted each year;[47] is there any evidence that, save perhaps in a relatively small proportion of cases of serious fraud, the requirement of proof of deception causes any difficulty? The possible replacement of this offence (and others) by an all-purpose fraud offence not dependent upon proof of deception might be said by some to be an overreaction to a more limited problem.

12.50 The fraud offence would also have the effect of covering some trivial conduct which ought not perhaps to be regarded as deserving of criminal sanction. This argument also appeared to weigh heavily with the opponents of clause

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47. See Appendix D.

12(3) of the Theft Bill in 1968.[48] Prosecutors would therefore be given a measure of discretion in deciding whether to prosecute which arguably would be too wide. On the other hand, in relation to theft for example, a large number of minor cases are dealt with by cautioning.[49] Would the discretion be any wider than it is at present in relation to the many other offences which potentially cover trivial conduct?

12.51 A further consequence of the breadth of the offence would be its concealment of the various policy options in the drafting of offences which in its generality it would cover. This is, perhaps, an argument against broad offences generally. Issues such as permanent or temporary loss for example are contentious and give rise to difficulties which are arguably best met only if the need for the law to cover them is demonstrated in each case, and then in the context where that need is shown. The existing scheme may also represent at least a rough classification of the different types of conduct according to their gravity and blameworthiness and provides different maximum penalties as a basis for sentencing policies. This structure would be lost if it was replaced wholly or in part by a broad fraud offence with the suggested maximum penalty of ten years. It is arguable that this would leave too much discretion in the hands of those charged with the responsibility for sentencing. Again, would this really be any different from the position in relation to other broad offences with relatively high maximum penalties?

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48. See para. 3.4, above.

49. In 1985, 72,904 defendants were cautioned by the police and 74,434 were convicted in the magistrates' courts of shoplifting.

3. No new frauds

12.52 Although cases do occasionally surface,[50] there is no evidence that criminals are frequently inventing new frauds not covered by the existing criminal law, as distinct from new fact situations which take much complicated unravelling before the law applicable to them can be ascertained. (The complications may of course mean that the investigation is not successful or is even never undertaken.) It is arguable that since it is Parliament, and not the judiciary, which has the responsibility of creating new offences, the proper approach for dealing with new frauds not adequately covered by existing offences should be for Parliament to pass legislation to cover similar conduct in the future. The fact that in the meantime a few who might deserve to have been penalised may escape ought not to be allowed to outweigh this important principle.

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50. E.g. Hollinshead: see para. 4.39, above.

## PART XIII

## TEMPORARY DEPRIVATION

13.1 As we explained at the end of Part VII, we have left over until now consideration of the various issues concerning the temporary deprivation of another's property. This is an area where it is arguable that examination of the issues arising might be better carried out as part of a wider review of the Theft Acts.[1] In the event, we decided to give these difficult issues our attention in this paper, even though their connection with conspiracy to defraud may be regarded perhaps as more theoretical than real, because we felt that they raised questions which deserved preliminary consideration at this stage.

13.2 We recognise that it is necessary to proceed with caution in this area. One reason is that the precise scope of conspiracy to defraud in this respect is unclear.[2] The other is that Parliament has, in both 1968 and 1978, set its face against widening the criminal law against theft and fraud to cover temporary deprivation and provided exceptions only in cases where it was thought necessary to do so. That does not of itself preclude reconsideration now of the policy settled, in some instances, almost twenty years ago by Parliament.[3] It does, however, indicate that the arguments for a change in the law, even in the light of the possible abolition of conspiracy to defraud, would need to be convincing.

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1. See para. 1.10, above.

2. See para. 4.5, above.

3. They were following the views of the majority of the Criminal Law Revision Committee who were reaffirming earlier statutory provisions and the common law.

13.3 The offences in the Theft Acts which require proof of an intent to deprive permanently are theft (Theft Act 1968, section 1); [related offences of burglary, robbery etc.]; obtaining property by deception (Theft Act 1968, section 15). In addition evasion of liability by deception (Theft Act 1978, section 2(1)(b)) requires proof of an intent to make permanent default and making off without payment (Theft Act 1978, section 3) has been interpreted[4] to require proof of an intention to avoid payment permanently. It may be noted, however, that the offence of obtaining services by deception (Theft Act 1978, section 1) in its application to property does not require proof of an intention permanently to deprive. The need to retain these restrictions will be considered separately below: a decision to alter one, however, does not mean that they should all be altered. We also consider whether the general fraud offence examined in Part XII should cover the causing of temporary losses.

## A. Theft

13.4 The case for extending the offence of theft to cover temporary appropriations has been developed by Professor Glanville Williams.[5] The main arguments which are put forward in favour of this can be summarised as follows:

(1) The existing law recognises the inadequacy of the present offence of theft by the survival of conspiracy to defraud and the creation of special

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4. R v. Allen [1985] A.C. 1029.

5. "Temporary Appropriation should be Theft", [1981] Crim.L.R. 129 (hereinafter "Williams"). He suggested (at p.130) that our review of conspiracy to defraud provided an opportunity to take a fresh look at the issues.

statutory offences,[6] but the coverage of the latter is rather arbitrary.[7]

(2) Even where the property which is taken is returned, the owner of it and the police may have been put to inconvenience.[8]

(3) The taker of the property may put it at risk, or make a profit from it, or return it in an impaired condition and, if he is a person of no substance, the civil remedies available will be inadequate.

(4) The taker may not know when he takes the property whether he will return it. The present requirement therefore is said to create difficulties for juries and magistrates and to impose a difficult burden of proof on the prosecution. There are some recorded instances of unmeritorious persons escaping prosecution or conviction because they alleged an intention to return the article.[9]

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6. E.g. the removal of articles from places open to the public and the taking of a motor vehicle : Theft Act 1968, ss.11 and 12; taking a postal packet in course of transmission by post: Post Office Act 1953, s.53.

7. Williams, pp.130-131. By way of example, he points out that it is an offence to make off temporarily with a cart, but not with a horse.

8. Williams, p.131.

9. Williams (at p.132) cites as an example the removal of Goya's portrait of the Duke of Wellington from the National Gallery in 1961. After the discovery of the painting four years later, the man who confessed to taking it said that he did not intend to sell or keep it. He was convicted of theft of the frame, but not of the portrait itself: Bunton, The Times 11 November 1965.

(5) Property may be removed temporarily in order to further an ulterior dishonest purpose,[10] for example, in order to cause loss to the owner or with an intention that necessarily involves such loss (for example, theft of information or copyright). The problem of industrial espionage would not be dealt with directly, but some conduct would be brought within the range of the criminal law.[11]

(6) The law would be simplified because technical difficulties (for example, concerning "conditional intention"[12]) or in relation to section 6(1) of the Theft Act 1968 (borrowing or lending for a period and in circumstances making it equivalent to an outright taking) would be avoided.[13]

(7) Temporary appropriations which impose upon the owner a risk (or at least a substantial risk) of loss should be penalised. The intent to deprive permanently does not include recklessness.[14]

(8) The value of articles often lies in their use and some articles only have short useful lives. The owner may suffer loss if he has to replace the

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10. E.g. Scott [1975] A.C. 819: see paras. 2.1 and 4.27, above.

11. Cf. para. 10.48, above.

12. Williams, pp.133-134.

13. The Court of Appeal in Lloyd [1985] Q.B. 829 agreed (at p.834) with J.R. Spencer's description of the section as one which "sprouts obscurities at every phrase".

14. Williams, pp.134-135.

article or be without it.[15] If the property is a profit-earning chattel, its temporary removal may result in the owner being permanently deprived of the lost profits.

(9) There is a contradiction in the Theft Acts in so far as an owner may steal from a temporary possessor of property, for example the hirer for a week if he intends to keep it for a week; but the non-owner who takes an article from an owner with the same intent does not.[16]

(10) Persons who take goods and hold them to ransom are not necessarily caught by theft.

(11) The taking of dangerous materials should be covered.

(12) Many other jurisdictions penalise dishonest takings.[17]

13.5 The arguments against extending criminal liability for temporary appropriations are:

(1) Either the workload of the courts would be increased; or

(2) Few prosecutions would be brought for temporary appropriations showing the changes to be unnecessary. (But in certain serious cases it is

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15. Williams, pp.135-136.

16. Williams, p.136.

17. E.g. Canada (see Appendix A, para. 20).

arguably socially desirable that prosecutions should be brought).

(3) People would not recognise temporary appropriations as theft. (But this would not be true of every example and the Oxford English Dictionary does not include an intent to deprive permanently in the definitions of "steal".)

(4) Trivial conduct would be penalised. This argument appealed powerfully to the majority of the Criminal Law Revision Committee and was elaborated on behalf of the Government of the day in the debates on the Theft Bill;[18] examples given included, borrowing a neighbour's lawn mower and using a friend's dinner jacket without consent. (This is not a conclusive argument. In general a sensible discretion is used in prosecuting theft at present. Careful drafting could be used to exclude trivial cases.)

(5) The police might be involved in wasteful and undesirable investigations into alleged offences of no social importance.

13.6 The question, therefore, is whether it would be desirable, in the light of the arguments just put, to extend the offence of theft by repealing the word "permanently" in section 1(1) of the Theft Act 1968. Such a reform might also enable other provisions in the Theft Act 1968 to be repealed: for example sections 6(1), 11 and 12. One difficulty would be that, while the offence in section 12 (taking a vehicle) is at present triable either way, the

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18. Hansard (H.L.), 5 March 1968, vol. 289, cols. 1298 et seq.

Criminal Justice Bill contains a proposal that the offence should be triable only in a magistrates' court with a maximum penalty of six months' imprisonment. If section 12 were to be retained as a summary offence, cases involving temporary deprivation of property other than vehicles etc. might be left to be dealt with under theft, but since that offence is triable either way, that would give rise to an anomaly. One way of avoiding this anomaly might be to provide that temporary appropriation of property in general should be made a separate offence. We note that the Criminal Law Revision Committee said[19] "If cases of temporary deprivation of property should become common, or if it should become too easy a defence to a charge of theft that the intention was to return property in the end, it might be necessary, notwithstanding these formidable difficulties,[20] to create an offence of temporary deprivation with a high enough maximum penalty for serious cases." If such conduct were to be made the subject of a summary only offence, would a maximum penalty of six months' imprisonment be sufficiently high for serious cases? We would welcome comments on the suggestions discussed.

B. Obtaining property by deception

13.7 The requirement of an intention permanently to deprive the owner of property was included in section 15 of the Theft Act 1968 so as to keep it in line with the

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19. Eighth Report (1966), Cmnd. 2977, para. 56.

20. The Committee thought that the conduct was essentially different from stealing; that it would be a considerable extension of the criminal law which would have socially undesirable consequences (quarrelling neighbours and families would be able to threaten one another with prosecution); that the police would become involved in wasteful and undesirable investigations; and that it would be difficult to draft an offence which would exclude trivial cases: ibid.

definition of theft and following the pre-existing law. It is arguable, therefore, that if any change is made to theft (or a new offence created) corresponding changes should be made in relation to section 15 (or a new offence created). This would mean that a person who obtains the hire of a car by deception would commit the offence of obtaining property by deception.

13.8 An argument against making any change here (in addition to the arguments listed at paragraph 13.5) is that such conduct already constitutes the offence of obtaining services by deception.[21] However, that offence does not cover the person who by deception obtains the use of property where no payment is to be made. Since section 15 covers the obtaining of a gift by deception, some would argue that there is no reason why obtaining the gratuitous use of property should not also be covered.

13.9 Again, we would welcome views on the desirability of extending section 15 of the Theft Act 1968 (or creating a new offence) to cover the temporary dishonest obtainings of property.

C. Evasion of liability by deception

13.10 Section 2(1)(b) of the Theft Act 1978 provides that a person commits an offence who by any deception:

> "with intent to make permanent default in whole or in part on any existing liability to make a payment, or with intent to let another do so, dishonestly induces the creditor or any person claiming payment on behalf of the creditor to wait

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21. Theft Act 1978, s.1.

for payment (whether or not the due date is deferred) or to forgo payment..."

This part of section 2 is concerned with the stalling debtor. The requirement of proof of an intention never to pay represents a compromise[22] between the view,[23] on the one hand, that there should be no criminal liability for the stalling debtor (who, it is said, should be left to the mercy of the creditor's civil law remedies) and the view,[24] on the other hand, that a person who deceives his creditor into waiting for payment should be liable even though he intends to pay at some time. The Criminal Law Revision Committee said that they "could not accept that it should be a criminal offence for a debtor to obtain by deception further time in which to pay a debt which he intends to honour"[25] and, after some hesitancy shown by the difficult passage of the clause through Parliament,[26] their view eventually prevailed.

13.11 Under section 16(2)(a) of the Theft Act 1968 (which was repealed and replaced in part by section 2(1)(b)), it had been held to be an offence for a debtor by deception to gain the opportunity to delay paying a debt.[27] Both the Committee and Parliament thought that the criminal law was too wide at this point; the Committee pointed out, by way of

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22. See Thirteenth Report of the Criminal Law Revision Committee (1977), Cmnd. 6733, para. 6.

23. See e.g. Professor Williams' note of reservation in the Thirteenth Report, at p.20.

24. Supported, for example, by Viscount Dilhorne, Lord Wigoder and the Criminal Bar Association.

25. Thirteenth Report, para. 6.

26. See para. 3.7, n.16, above and references cited.

27. D.P.P. v. Turner [1974] A.C. 357.

a hypothetical example, that it was wide enough to make it an offence for a housewife to tell the tallyman that she could not pay this week because her husband was off work sick, when this was not true. This is admittedly a trivial case, but not all cases of dishonestly delaying payment of a debt by deception may be considered trivial. As has been pointed out:[28]

> "A small workman put upon in this way may suffer very real detriment. He may have a "cash-flow" problem. Then too, it may be unrealistic to assume that he will be repaid as soon as he again approaches the debtor. Repeated and wearisome pressure may have to be applied before the debtor ultimately pays up. Is the workman's interest not worth protecting by the criminal law?"

What, also, of the case of a company whose deliberate policy is to delay paying debts owing to small traders, using whatever (possibly dishonest) means they can and aware that some at least of the small traders may be caused financial problems by being kept out of their money, because they know that they can earn interest by investing the money they would otherwise have paid over. Although it has been suggested by the Court of Appeal that the deliberate and dishonest agreement to cause a creditor not to press for payment for goods at the proper time is not a conspiracy to defraud,[29] is there not a case for reconsidering whether Parliament was right to take the course it did in 1978 in removing criminal liability for such conduct when committed by an individual? May it not fairly be said that Parliament was over-concerned to exclude criminal liability for trivial cases and had failed to notice that some, arguably more serious, conduct would not be caught? We would welcome

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28. Leigh and Temkin, [1975] M.L.R. 186, 190.

29. R v. Zemmel and Melik (1986) 82 Cr.App.R. 279; but see [1985] Crim.L.R. 213, 215 for a criticism of the decision by Professor Smith.

views on whether the existing offence under section 2(1)(b) of the Theft Act 1978 draws the right boundary here or whether it requires further rethinking.

D. Making off without payment

13.12 The issue here is whether the offence under section 3 of the Theft Act 1978 should be left restricted to cases of restaurant bilking (etc.) where it is shown that the defendant intended to avoid payment permanently (as the Criminal Law Revision Committee recommended it should[30] and as the House of Lords decided it did[31]) or whether an intention to delay or defer payment should suffice in these cases.

13.13 Despite the decision in Allen[32], Lord Hailsham did suggest that "There may well be something to be said for the creation of a criminal offence designed to protect, for instance, cab drivers and restaurant keepers against persons who dishonestly abscond without paying on the spot and without any need for the prosecution to exclude an intention to pay later, so long as the original act of 'making off' could be described as dishonest."[33] He went on to suggest that such an offence (unlike the offence in section 3) might be triable only summarily as is the case with, for example, the offence of travelling on a railway with intent to avoid payment of the fare.[34]

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30. Thirteenth Report (1977), Cmnd. 6733, paras. 18-21.

31. R v. Allen [1985] A.C. 1029.

32. Ibid.

33. Ibid., p.1035.

34. Regulation of Railways Act 1889, s.5(3)(a): and see Corbyn v. Saunders [1978] 2 All E.R. 697, holding that the offence does not require proof of an intention permanently to avoid payment.

13.14 An argument against extending section 3 for this purpose is that if it were to be given a wider scope people would assume that a person convicted of the offence never intended to pay.[35] But people may make all manner of assumptions about the true extent of an individual's guilt following upon conviction; this is a fact of life and cannot really provide a justification for shaping an offence in a particular way. A stronger argument perhaps against either extending section 3 or creating a separate summary offence is that the defence of "I meant to go back and pay when I had the money" can usually be given short shrift by the jury. Is there any evidence that this defence is frequently run and, if it is, does it give rise to difficulties? Again, we would welcome views and comment from those with experience of prosecutions in this area.

## E. A possible general fraud offence

13.15 Finally, if the general fraud offence considered at option (D) above were to be considered acceptable as a replacement for conspiracy to defraud, we ask whether it should also deal with the case where a person dishonestly causes another person to suffer a temporary loss of property. For the most part the arguments already considered above for and against the possible extension of the existing offences in the Theft Acts apply here too and they need not be repeated. The offence suggested would already be very wide and it may be argued that to extend it further to cover temporary losses would be to go too far. On the other hand, might there not be some cases where even the temporary loss of property might result in substantial prejudice to its owner and where the criminal law ought to be capable of intervening to penalise those who have caused it by dishonest means?

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35. See Spencer, "The Theft Act 1978", [1979] Crim.L.R. 24, 38.

## PART XIV

## PROVISIONAL CONCLUSIONS AND SUMMARY OF POINTS FOR CONSULTATION

14.1 We end this paper with a summary of our provisional conclusions and the options for reform of the law on which we invite comments from all interested persons.

### The main issue

14.2 The principal issue raised in this consultation paper is the question of the possible long-term reform of the common law offence of conspiracy to defraud. The main questions upon which comments are invited are whether:

(a) despite the objections raised, conspiracy to defraud should be retained as a common law offence; and

(b) if not, whether it should be replaced either (i) by a statutory offence of conspiracy to defraud; or (ii) by narrowly drawn statutory offences fitted into the existing scheme of offences; or (iii) by a general fraud offence capable of being committed by a single individual.

### Territorial jurisdiction

14.3 We make no proposals in this paper with regard to the territorial jurisdiction of either conspiracy to defraud or the possible offences suggested for its replacement. This important question is being considered in a separate context covering fraud offences generally. (para. 2.7)

## The consequences of abolishing conspiracy to defraud

14.4 If conspiracy to defraud were abolished, gaps in the law would appear to arise in the following areas:

(a) Deceiving a machine, including a computer. (para. 4.14)

(b) Gambling swindles. (para. 4.41)

(c) Making and supply of material designed to defraud (including commercial counterfeiting). (paras. 4.39 and 4.40)

14.5 Other areas in which there might be gaps in the law are:

(d) The temporary deprivation of property of another, including the use of another's facilities. (para. 4.6)

(e) Dishonest failure to pay for goods or services with the intention of delaying or deferring payment. (para. 4.32)

(f) Employees dishonestly causing loss to employers by making and retaining a secret profit. (para. 4.38)

(g) Fraudulent acquisition of valuable confidential information. (para. 4.44)

(h) Certain non-economic frauds. (para. 4.58)

14.6 In addition there are two broad areas where the abolition of conspiracy to defraud would create unacceptable practical difficulties in prosecuting certain types of criminal conduct:

(i) A false general impression - long-firm frauds. (para. 4.19)

(j) Other commercial swindles. (para. 4.29)

Objections to conspiracy to defraud

14.7 A number of objections in principle to the continuation of conspiracy to defraud have been identified:

(i) that it runs counter to the principle established in the Criminal Law Act 1977 that an act which is lawful if done by one person should not become unlawful merely because it is agreed to be done by more than one. (paras. 5.2-5.4)

(ii) that the offence is too wide (a) because of the overlap with statutory conspiracy and (b) because it covers certain conduct which arguably ought not to be criminal at all. (paras. 5.5-5.7)

(iii) that the uncertain boundaries of the offence mean that it offers insufficient guidance as to what can or cannot lawfully be done. (paras. 5.8-5.9)

(iv) that in some cases the maximum penalty for conspiracy to defraud is higher than the maximum penalties for the statutory offences which are subsumed. (paras. 5.10-5.11)

## Procedural and other advantages of conspiracy to defraud

14.8 On the other hand, there are a number of arguments which have been advanced in support of the availability of a charge of conspiracy to defraud:

(i) that a charge of conspiracy to defraud can sometimes better reflect the true nature of the fraud which has been committed than a charge of one or more existing substantive offences or of a statutory conspiracy to commit one. (paras. 6.2-6.4)

(ii) that the presentation of serious fraud cases involving complex transactions can be assisted by a charge of conspiracy to defraud, because it better enables the jury to be given a clear, overall picture than a charge of several offences. (paras. 6.5-6.7)

(iii) that a charge of conspiracy to defraud can help the prosecution where they are unable to forecast which of two or more substantive offences will be proved, even though their evidence reveals dishonest conduct which calls for an answer. (para. 6.8)

(iv) that the flexibility of the offence means that there is less need to recast the law to meet changes in social behaviour and therefore less likelihood that skilful fraudsters will escape the net. (para. 6.9)

(v) that the high maximum penalty allows the courts to impose an appropriate sentence in each case according to its seriousness and other relevant factors. (para. 6.10)

## The options for reform

14.9 We have examined three possible options for replacement of conspiracy to defraud. Although the options are presented as alternatives, it would be possible to combine some of them, or aspects of some of them. Since arguably none of the options presents an ideal solution, we have included as an option the possibility of retaining the existing, albeit unsatisfactory, offence.

The options which we provisionally propose are:

### OPTION (A) - Retention of the common law offence

14.10 Do the advantages attaching to the offence outweigh the disadvantages so as to justify its retention? Can all or most of these advantages be met, without similar objections, by one or other of the options for reform mentioned below? (Part VIII)

### OPTION (B) - Statutory conspiracy to defraud

14.11 Under this option, the common law offence would be abolished and replaced by a statutory offence of conspiracy to defraud. The offence might be defined either in accordance with the common law definitions; or those definitions might be limited for the purpose of the statutory offence, perhaps in line with the offence suggested as Option (D). (para. 9.1)

14.12 While some of the objection of uncertainty of the common law offence would be eliminated, this option would suffer from broadly similar objections of principle.

### OPTION (C) - Reforming the present scheme of offences

14.13 This option involves looking at the gaps in the law which would appear to arise from the abolition of conspiracy

to defraud and closing them, where necessary, either by extending existing offences or by the creation of new specific offences. We invite comment on whether, if this option were to be followed, the following reforms might be made:

(i) Deceiving a machine

An extension of the existing definition of "deception" in the Theft Act 1968 (section 15(4)) to cover the deception of a machine (including a computer). (para. 10.9)

(ii) Fraudulent trading

The creation of an offence of fraudulent trading (in place of section 458 of the Companies Act 1985) covering any form of business organisation, whether it be a company, partnership, or individual trading alone. (para. 10.24)

(iii) Gambling swindles

The creation of a new offence (in place of section 17 of the Gaming Act 1845) penalising anyone who dishonestly affects the outcome of any event upon which anyone stands to lose or gain in money or money's worth, whether as a participant or by betting on the outcome, or dishonestly to affect the amount which stands to be lost or gained by betting on the outcome of any such event, in each case with intent to make a gain for oneself or another, or to cause loss to another. (Appendix B)

(iv) Making and supply of material designed to defraud (including counterfeiting)

The creation of an offence either:

(a) to make, sell, hire, offer for sale or hire a ["black box" device for defrauding electricity authorities]; or

(b) to make, sell, hire or offer for sale or hire, or possess any article which he knows (or believes) is or is likely to be used in the commission of any offence involving fraud. (para. 10.36);

and

The possible creation of an offence which deals with the counterfeiting of commercial products. (para. 10.43)

14.14 We also ask whether the maximum penalties for certain existing substantive offences should be raised to enable the courts to impose an adequate penalty particularly where large sums of money are involved. Two possibilities are offences under the Copyright Act 1956 and fraudulent trading under the Companies Act 1985 (s. 458). (para. 10.61)

14.15 We invite comment on our provisional view that no extension of the existing law or new offence would be required as a consequence of the abolition of conspiracy to defraud in the following areas:

(i) the acquisition of confidential information by dishonest means. (para. 10.48)

(ii) the making of secret profits by persons in a fiduciary position from the abuse of their position. (para. 10.52)

If, however, the creation of an offence were favoured, we invite comment on whether it should be aimed at penalising an employee or agent who uses his position for gain without the consent of his employer or principal where the latter thereby suffers a loss. (para. 10.53)

(iii) dishonestly inducing a person performing a public duty to act contrary to his public duty. (para. 10.60)

14.16 The main advantage of this option is that it is consistent with generally accepted principles of the substantive criminal law. The main disadvantage is that it would share few, if any, of the advantages attaching to conspiracy to defraud and could make the prosecution of fraudsters more difficult.

OPTION (C(1)) - Procedural reform

14.17 We invite comment on a possible procedural change in relation to the drafting of indictments in cases of systematic dishonesty. This change might be made in addition to the alterations to the substantive law suggested under option (C) to overcome in part at least some of its disadvantages. Under the present law, the prosecution are not permitted to allege, in charging a single offence, the total amount of a general deficiency over a given period of time, where it has evidence of the individual transactions. Should the procedure be altered to permit a single charge of a Theft Act offence in these cases? (paras. 11.6-11.7)

OPTION (D) - A general fraud offence

14.18 This option would involve the replacement of conspiracy to defraud by a general fraud offence capable of being committed by a single individual. A possible basic definition of the offence is suggested as follows:

> "Any person who dishonestly causes another person to suffer [financial] prejudice or a risk of prejudice, or who dishonestly makes a gain for himself or another commits an offence." (para.12.4)

For the purpose of this offence "[financial] prejudice" might be defined as occurring to a person if, and only if -

(i) he suffers a [temporary or permanent] loss of property; or

(ii) he is deprived of an opportunity to earn remuneration or greater remuneration; or

(iii) he is deprived of an opportunity to gain a financial advantage otherwise than by way of remuneration; or

(iv) someone is given an opportunity to earn remuneration or greater remuneration from him; or

(v) someone is given an opportunity to gain a financial advantage from him otherwise than by way of remuneration."(para.12.12)

"Loss" would include not getting what one might get as well as parting with what one has.

"Gain" and "property" could be defined as in the Theft Act 1968 (sections 34(2) and 4(1)).

"Dishonestly" could be left undefined. (A possible alternative might be to use the term "fraudulently" which likewise could be left undefined.) (paras. 12.15-12.20)

14.19 The width of a general fraud offence defined as suggested would mean that a number of existing offences would be totally subsumed. We invite comment on two possible approaches to such overlap. These would involve either:

(i) the abolition of the offences subsumed, that is to say offences of:

obtaining property by deception (Theft Act 1968, section 15)
obtaining a pecuniary advantage by deception (Theft Act 1968, section 16)
evasion of liability by deception (Theft Act 1978, section 2)
making off without payment (Theft Act 1978, section 3).

A possible way of avoiding the total overlap of theft (Theft Act 1968, section 1) might be to include a provision which would preclude conviction of fraud where the relevant conduct constitutes the offence of theft. (paras. 12.22-12.33)

or:

(ii) limitations, either procedural or definitional, placed on the offence. Possibilities include:

(a) a formal consent provision, or more likely, the issue of guidelines for prosecutors (para. 12.36); and

(b) a provision limiting prosecution for the offence to cases where the person charged has committed or was party to the commission of a fraud or series of related frauds which caused (or would or might have caused) loss in excess of, say, £5,000 (para. 12.38); and

(c) judicial control (para 12.39).

14.20 Whether such an offence should be made triable only on indictment or triable "either way" would depend on its purpose. (para. 12.40) In the latter event, should there also be a provision limiting trial to magistrates' courts for cases where the loss suffered is below a certain monetary limit? (para. 12.42)

Would a maximum penalty of ten years' imprisonment be appropriate for such an offence? (para. 12.43)

14.21 The main advantages of this option are that it would facilitate the prosecution of fraudsters, while overcoming some of the objections to the common law offence. It would also enable some simplification to be made of the existing scheme of offences in the Theft Acts. The main disadvantages would be that arguably it would offend important principles of the criminal law.

**Temporary deprivation**

14.22 We invite comment on whether some of the existing offences in the Theft Acts 1968 and 1978 might be extended to cover temporary deprivation. The possibilities for reform include:

(i) Either extending the offence of theft by repealing the word "permanently" in section 1(1) of the Theft Act 1968, or creating a separate offence covering the temporary appropriation of property. (para. 13.6)

(ii) Either extending the offence of obtaining property by deception by repealing the word "permanently" in section 15(1) of the Theft Act 1968, or creating a separate offence covering the temporary obtaining of property by deception. (para. 13.9)

(iii) Removing the requirement of proof of an "intent to make permanent default" from the offence of inducing by deception a creditor to wait for payment under section 2(1)(b) of the Theft Act 1978. (para. 13.11)

(iv) Either removing the requirement of proving an intent "permanently" to avoid payment from the offence of making off without payment in section 3 of the Theft Act 1978, or creating a separate summary offence where proof of this element would not be a requirement. (para. 13.14)

(v) If the general fraud offence considered at option (D) above were to be enacted, should it also cover the case where a person dishonestly causes another person to suffer a temporary loss of property? (para. 13.15)

## APPENDIX A

## OFFENCES OF THEFT AND FRAUD IN OTHER JURISDICTIONS

### Introduction

1. In this Appendix we summarise provisions relating to offences of theft and fraud in various different jurisdictions both common law and civil. Caution is needed in using this material to draw conclusions about foreign laws. The extracted part is only one part of the law of the jurisdiction concerned and also imperfections of translation in some cases may leave ambiguities. Moreover, we cannot be certain that it takes account of recent changes in the law in the relevant jurisdictions.

2. The jurisdictions covered in this Appendix are as follows:


Scotland (paras. 3 - 16)
Canada (paras. 17 - 40)
Australia (paras. 41 - 71)
United States of America (paras. 72 - 98)
France (para. 99)
Federal Republic of Germany (paras. 100 - 101)
Sweden (para. 102)


### 1. Scotland

3. The law in Scotland differs markedly from that applying south of the Border in that it possesses a broad offence of fraud in addition to offences of theft and embezzlement.

(a) Theft

4. Theft is commonly defined as the dishonest taking of the goods of another,[1] but the practical ambit of the offence has been extended to cover other forms of appropriation and conversion.

(i) Property that can be stolen

5. To be the subject of theft, property must be both corporeal and moveable. This includes money in the form of notes, coins or other negotiable instruments, but excludes choses in action.[2] It seems that the taking of a corporeal document embodying an incorporeal right is in practice adequately treated as theft. Information per se, which by definition is incorporeal and to which no proprietary rights attach at civil law, cannot be the subject of theft.[3]

(ii) The mental element

6. Scots law requires that the accused intended fraudulently, and permanently, to deprive the owner of his goods whether for the gain of the accused or not. Taking with intent only to use the goods for a time is not therefore theft, but it is conduct which may be punished as an "irregular and punishable Act"; the crime of taking and using was employed to deal with the practice of joy riding in cars.[4]

(iii) Theft distinguished from fraud

7. It is the absence of consent that distinguishes theft from fraud. There can be no theft if the owner agreed to transfer property

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1. See e.g. Hume, i. 57; Alison, i 250; Macdonald, 16.

2. Gordon, Criminal Law (2nd ed., 1978) (hereinafter "Gordon"), p. 471,

3. See Gordon, para. 14-32 and Report on Computer Crime (1987), Scot. Law Com. No. 106, paras. 2.12-2.14.

4. See Burnett, A Treatise on Various Branches of the Law of Scotland (1811), p. 115; and Strathern v. Seaforth 1926 J.C. 100.

in the goods, even though the consent was obtained by fraud.[5] Hence, where A gets possession of goods by fraud, for example by giving a false account of his financial situation, and subsequently appropriates them, he is, strictly speaking, guilty of two crimes, fraud and theft, the fraud consisting in A's inducing B to part with the goods and the theft in his subsequent appropriation of them. There is some authority that both can be charged cumulatively but the courts have discouraged this, and usually only one crime is charged. The choice of charge seems to be based more upon a pragmatic decision as to which model of each crime the conduct of the accused most resembles.[6]

8. The distinction between the two offences diminished in practical importance for the criminal law with the passing of the Criminal Procedure (Scotland) Act 1887 which provided that an accused charged with theft may be convicted of fraud, and vice versa.[7]

(b) Fraud

9. One commentator has described "fraud" in Scotland as an offence of "breathtaking" scope.[8] Originally the offence required the causing of economic or patrimonial loss to the victim. However, in the absence of any crime of attempted fraud (and even after section 61 of the Criminal Procedure (Scotland) Act 1887 made all attempts to commit a crime indictable), the courts gradually extended the ambit of the offence so that today it need no longer involve either the causing of any actual loss[9] or relate to any economic matter at all.[10]

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5. Hume, i. 57; Alison, i 259.

6. Gordon, para. 14-53.

7. See now Criminal Procedure (Scotland) Act 1975, ss. 60 and 312(m).

8. Leigh, The Control of Commercial Fraud (1982), p. 82.

9. Adcock v. Archibald 1925 J.C. 58.

10. Wm. Fraser (1847) Ark 280.

10. The generally accepted definition of the offence is that it consists in the -

> "bringing about of some definite practical result by means of false pretences".[11]

However, Gordon is of the opinion that this formulation is in fact too wide a statement of the law because "to do away with the requirement of prejudice or disadvantage would lead to surprising results".[12] He argues that the fraud must result in some practical result, some legally significant prejudice to the victim, such as: parting with possession or property in goods or money; sustaining personal injury; the granting of a right or privilege; inducing the victim to refrain from exercising a right or privilege; inducing the victim to render himself liable to prosecution.[13] It may be that there are in fact fewer constraints on prosecutors than he suggests and he himself notes the frequent use of the Archibald formula in recent cases.[14]

11. It would appear, therefore, that only the means by which the fraud is carried out, the false pretences, serves as a constraining factor upon the offence. However, while it is clear that a representation about the future is not a relevant basis for a charge of fraud, Richards v. H.M. Advocate[15] resolved some judicial controversy by establishing that a false statement of present intention as to future conduct could ground a charge of fraud. Gordon considers that it follows from Richards that it is an offence to obtain anything, including goods, services or credit, by a false representation that one intends to pay for them; and that Scots law therefore has no need of any special provision for the fraudulent obtaining of credit or of

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11. Adcock v. Archibald 1925 J.C. 58.

12. Gordon, para. 18-19.

13. Gordon, para. 18-21 - 18.25.

14. Gordon, para. 18-19, n. 18.

15. 1971 J.C. 29.

services such as restaurant meals or board and lodgings, or for travelling on trains without paying.[16]

12. The common law offence of fraud is wide enough to encompass all the deception offences under the English Theft Acts, as well as the offence under section 3 of the Theft Act 1978 of making off without payment. A charge of fraud can also embrace conduct beyond the scope of the Theft Acts, because it need not relate to economic matters.

13. In comparison with conspiracy to defraud, Scottish fraud is both wider, in that it requires no element of combination or of injury or damage to the victim, actual or intended, and narrower, since it requires an element of "deception" (however broadly that is interpreted).[17]

14. The advantages of the offence of fraud lie in its simplicity and flexibility, and this would appear always to have been the case. Hume discussed the capacity of the Scottish common law to deal with fraud and swindling in 1797:

> "Touching tricks of this sort, the more profitable market of England, and its more artificial and punctilious system of law, have obliged our neighbours to guard against them as they arise (in which case the remedy is always imperfect) by successive provisions of the legislature. But as most of these to not extend to Scotland, so neither have we any need of them; since our common law takes cognizance of, and competently punishes all such practices ..."[18]

This assessment probably remains equally true today. However, this may be as much due to the unwillingness of the Scottish courts to explore

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16. Gordon, para. 18-31.

17. Cf. Scott v. Metropolitan Police Commissioner [1975] A.C. 819: see para. 2.1, above.

18. i. 168.

intricate problems of criminal law, as to any inherent genius of the system.[19]

(c) Forgery and uttering

15. Scots law possesses a further ancient offence of still wider scope than fraud, namely the uttering of forged documents, which requires no practical result to have been achieved by the uttering, and which Gordon describes as a "preventive crime designed to protect the sanctity of writing in the law, and particularly the sanctity of signed documents."[20]

(d) Statutory frauds

16. In addition to the wide common law offence of fraud, there are a number of statutory offences of fraud which seek to penalise specific forms of fraudulent practice. These range from provisions in the ancient Bankruptcy Acts of 1621 and 1696,[21] to company and accounting frauds.

## 2. Canada

17. The Canadian Criminal Code retains essentially the same structure of offences as the original Code of 1892, which was based on Stephen's Draft Code of 1879. Although the Code is now the subject of a major review, it is likely that the essence of the offences will remain the same.[22]

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19. Comment by Christopher Gane in an unpublished paper prepared for a meeting of the Criminal Law Group at the SPTL Annual Conference in 1984.

20. Para. 18-34.

21. See now Bankruptcy (Scotland) Act 1913.

22. See 30th Report, Recodifying the Criminal Law, Vol. 1 (1986), and paras. 33-40, below.

(a) Offences of theft and other forms of taking

18. The definition of basic theft in section 283 of the Code is fraudulently and without colour of right taking or converting property to one's own use, with any of a number of specified forms of intention.

(i) Property capable of being stolen

19. Anything "whether animate or inanimate" may be stolen, including credit.[23] A current issue in Canada relates to the question of whether confidential information is property: the Ontario Court of Appeal recently held, by a majority, in Stewart[24] that information was capable of being property under the code,[25] and, if upheld by the Supreme Court, would represent a significant widening of the concept of theft.[26]

(ii) The mental element

20. Section 283 sets out the relevant forms of intention sufficient for a charge of theft, and includes an intention temporarily to deprive the owner.

(iii) Theft distinguished from fraud

21. The existence of the broad fraud offence is perhaps the reason why Canadian courts do not seem to have become embroiled in the complexities of the meaning of appropriation.[27] Implicit in the

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23. Scallen (1974) 15 C.C.C. (2d) 441 (B.C.C.A.).

24. (1983) 5 C.C.C. (3d) 481. (The decision is still under appeal to the Supreme Court.)

25. Cf. Oxford v. Moss (1978) 68 Cr. App. R. 183, para. 4.41, above.

26. The Court of Appeal in Aberta refused to follow Stewart in Offley (1986) 51 C.R. (3d) 378.

27. Cf. Lawrence [1972] A.C. 626 and Morris [1984] A.C. 320.

Canadian offence of theft is the condition that the taking be without consent.

(iv) Other specific theft offences

22. The Code contains twenty four other sections which deal with forms of theft. These fall into three categories dealing with (a) special kinds of property, e.g. electricity (section 286), motor vehicles and vessels (section 295), credit cards (section 301); (b) special categories of victim, e.g. bailees (section 285), persons required to account (section 290); and (c) related offences, e.g. possession of a device to obtain a telecommunication facility or service (section 287.1), misappropriation of money held under direction (section 292), fraudulent concealment (section 301).

(b) Offences involving deceit and fraud

23. The Code contains three basic fraud offences: obtaining property by false pretences (section 320(1)(a)); obtaining credit by false pretences or fraud (section 320(1)(b); fraud (section 338(1)).

24. The reason for the existence of these three overlapping offences in different parts of the Code is historical. The first two were specifically created to fill what were then gaps in the law of theft: obtaining property by false pretences because the victim's apparent consent to part with the property ruled out theft; and obtaining credit by false pretences because until 1955, theft could not be committed in respect of intangibles. The development of the offence of fraud was quite different.

(i) Fraud

25. There was no general offence of fraud until 1948, when one was introduced to replace the existing statutory offence of conspiracy to defraud. It declares:

**Fraud - Affecting public market**

338 (1) "Everyone who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of the Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security" is guilty of an offence.

The legislative aim was to avoid the need to establish a conspiracy in connection with fraudulent schemes operated through the machinery of the stock market.[28] However, one commentator[29] recently declared that from section 338 alone, "the Canadian judiciary, unaided by Parliament, has fashioned the rather stark words of section 338... into a lithe and effective sanction against dishonesty of all kinds." He concludes that the law of fraud has been so developed as to provide a clear and welcome standard of punishable behaviour, and one which is in no need of codification. Other commentators,[30] however, are less sanguine, and have questioned whether this ad hoc development in fact accords with the basic tenets of criminal law recently adopted as federal government policy,[31] that laws be certain and accessible to both the profession and the general public, clearly articulated as established law before the commission of any act which is subsequently challenged in the courts; and have drawn attention to important questions which are not touched upon in the developing case law, namely what sort of fraud law should exist, what precise forms of dishonesty the state desires to penalise.[32]

26. A landmark case in the development of fraud was Olan, Hudson and Hartnett[33] where the Supreme Court radically reformulated the elements of the offence. In outline, the accused in that case took over a company, liquidated its blue chip stock portfolio, and made a number of highly speculative investments. The recipients of the investments

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28. Cf. Harvey, (1948) 26 Can. Bar Rev. 1319.

29. Ewart, Criminal Fraud (1986), p.1.

30. E.g. Gilhooly, (1986) 28 Crim. L.Q. 508.

31. See, Criminal Law in Canadian Society, (1982).

32. See Moskoff, (1982) 24 Crim. L.Q. 117.

33. (1978) 41 C.C.C. (2d) 145 (SCC).

made the funds available to the accused to pay the purchase price of the company taken over, and so directly benefited the accused. It was held that the risk of financial loss to the company taken over, caused by the speculative nature of the investments, constituted evidence of deprivation of that company; and given the evidence of dishonesty which the court found, in using corporate funds for personal ends, there was then evidence of fraud.

27. The Supreme Court addressed in detail the essential elements of the offence which, together with some subsequent developments, are set out below.

Deprivation

28. The Court established the following definition of deprivation:

> "The element of deprivation is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim. It is not essential that there be actual economic loss as the outcome of the fraud."[34]

This broad approach was followed in Kirkwood[35] where the accused was found to have deprived the victims within the terms of section 338 by diminishing their opportunity to make a profit (even where the receipt of a specific profit was uncertain); and in Knowles[36] the court found evidence of deprivation where the accused caused a company to make a loan it would not have made had it known that he would be the beneficiary, even though the loan was secured and was used for the precise purpose for which it was granted.

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34. Ibid., p. 150.

35. (1983) 5 C.C.C. (3d) 393 (Ont C.A.).

36. (1979) 51 C.C.C. (2d) 237 (Ont C.A.).

The means employed

29. The Supreme Court in Olan also resolved the previous uncertainty as to the meaning of the term "other fraudulent means", holding that these words include "means which are not in the nature of a falsehood or a deceit; they encompass all other means which can properly be stigmatised as dishonest."[37] Since the concept of dishonesty includes the narrower "deceit" and "falsehood", Dickson J. subsumed them into the concept of dishonesty:

> "two elements are essential, 'dishonesty' and 'deprivation'. To succeed the Crown must establish dishonest deprivation."[38]

No further elaboration of the term dishonesty was offered in the case, but "dishonest means" have been found in the following types of situation:

(a) Use of corporate funds for personal purposes: the situation in Olan itself;[39]

(b) Non-disclosure: dishonesty, unlike deceit or falsehood, has no connotation of a direct misrepresentation; the courts are thus freed from the uncertainty as to whether a deliberate non-disclosure may fall within the offence;[40]

(c) Exploiting a weakness: evidence of fraud has been found where the accused took advantage of the victim's carelessness, even where the victim was a bank, and the fraud was only successful because of the mistake of the bank employees.[41]

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37. Loc. cit., p. 149.

38. Ibid., p. 150.

39. See also Marquardt (1972) 6 C.C.C. (2d) 372 (B.C.C.A.).

40. E.g. Cote (1982) 3 C.C.C. (3d) 557 (Que. C.A.).

41. See Cote ibid., and Hansen (1983) 25 Atla. L.R. (2d) 193 (C.A.).

The mental element in fraud

30. Section 338 is silent on the mental element. Some controversy exists as to whether the requisite mental element relates only to the external acts constituting the offence, or whether proof of an additional element of moral obloquy is required.

31. There is a "formidable line of authority" which, without explicitly discussing it, supports the former, more traditional approach.[42] Some cases, however, have recently shown an interest in establishing the mental element by reference to the accused's own opinion on whether he was honest.[43] It is not yet settled which will become the established approach.

(ii) Obtaining property and credit by false pretences

32. In view of the scope of the general fraud offence at section 338, these offences would appear now to be largely obsolete.

(c) Recommendations of the Law Reform Commission

33. The proposals put forward in the Law Reform Commission's recent Report[44] would reduce the number of property offences to theft, fraud, obtaining services, a forgery and falsification offence, and a residual chapter on commercial frauds and related matters (proscribing conduct

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42. E.g. Lafrance (1975) 39 D.L.R. (3d) 693 and Lemire (1965) 51 D.L.R. (2d) 312 where the Supreme Court of Canada saw no need to look for evidence of subjective dishonesty or of evil intent in order to find an intent to defraud.

43. E.g. Doren (1982) 135 D.L.R. (3d) 258 (C.A.) and Black and Whiteside (1983) 5 C.C.C. (3d) 313.

44. 30th Report, Recodifying the Criminal Law, Vol. 1 (1986).

not covered by the general provisions, but which warrant criminal sanction) which is to be drafted after further consultation.[45]

34. The Commission has not, however, presented a single set of proposals. It is divided on the vexed question of dishonesty: should an element of wrongfulness or "crookedness" be proved in addition to the other elements of the offence? Some members of the Commission thought not: "dishonestly" in the definition of an offence is a culpability word or a type of mens rea which is not defined in the culpability clause or in the General Part of the proposed Code; further, it is a word whose use in the Theft Act 1968 had, they thought, created problems for the English courts. Therefore the formulation proposed by this group made the essence of the crimes the appropriator's lack of right to appropriate.[46]

35. The other members of the Commission favoured the solution offered in earlier proposals which made dishonesty the kernal of the proposals:

> "The key word in the definition is 'dishonesty'. This, the mens rea term, has a common sense meaning, is universally understood and is only definable in less comprehensible terms. Accordingly the draft leaves it undefined."[47]

The Report makes it clear that dishonesty here means two things: it includes the claim of right defence; but, in addition, the act must be "not merely wrongful but also 'crooked'".[48] It is unclear exactly what is intended here; no definition is offered, the concept being variously described as being "crooked", "fraudulent" or "deceitful".

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45. Ibid., p. 80.

46. Ibid., p. 78.

47. See Working Paper No. 19, Theft and Fraud (1977), p. 19.

48. 30th Report, p.75.

36. Unable to agree, the Commission present alternative formulations:

Theft

37. (i) Everyone commits a crime who dishonestly appropriates another's property without his consent.

or

(ii) Everyone commits a crime who appropriates another's property without his consent and without any right to do so.[49]

Both formulations simplify many of the aspects of theft, absorbing all the specific theft offences. Thus "appropriate" is defined as to "take, borrow, use or convert" property. "Property" is defined so as to include "electricity, gas, water, telephone, telecommunication and computer services."

Obtaining services

38. (i) Everyone commits a crime who dishonestly obtains for himself or another person services from a third party without full payment for them.

or

(ii) Everyone commits a crime who, without a right to do so, obtains for himself or another person services from a third party without fully paying for them.[50]

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49. Clause 13(1).

50. Clause 13(2).

These proposals consolidate the present offences of dishonest obtaining of accommodation (section 322), of transportation (section 351(3)), and of other services (section 320(1)(b), obtaining credit by fraud). "Services" are not, however, defined.

Fraud

39. (i) Everyone commits a crime who dishonestly, by false representation or by non-disclosure, induces another person to suffer an economic loss or risk thereof.

or

(ii) Everyone commits a crime who, without any right to do so, by dishonest representation or dishonest non-disclosure induces another person to suffer an economic loss or risk thereof.[51]

This clause reduces the separate fraud and false pretences offences into one single offence with two elements. First, there must either be false representation or non-disclosure: "representation" is defined so as to reproduce the present law and its developments in cases such as Olan. The clause provides:

> "Representation" means a representation whether express or implied (including impersonation) as to a past, present or future fact, but does not include exaggerated statements of opinion concerning the attributes or quality of anything."

"Non-disclosure" is defined as a failure to perform a duty to disclose arising from:

(a) a special relationship entitling the victim to rely on the defendant; or

(b) conduct by the defendant or another person acting with him, creating or reinforcing a false impression in the victim's mind or preventing him from acquiring information.

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51. Clause 13(3).

Second, the representation or non-disclosure must induce the victim to suffer an economic loss or risk thereof. Here again the proposals seek to embody the law as defined in Olan.

"Dishonest" in the second formulation

40. While the first formulation adheres to the same format here, requiring an additional element of "crookedness", the second must find a form of words which can express the essence of fraud, which must be some element of "dishonesty". The accompanying comment states that:

> "Again, the culpability of the offence is formulated in terms of there being no right to justify the inducement... But the force of the deceitfulness or fraud is brought out by using "dishonest" to describe the representation or non-disclosure."

No further definition of dishonesty is offered.

## 3. Australia

41. The criminal law in Australia is primarily a matter for each State. The Commonwealth can only create penal offences as an incident to the exercise of some other power (including, however, the governance of the federal territories, reserved to the Commonwealth by the Constitution).

42. Three of the States (New South Wales, South Australia and Victoria) retain a common law system, while Queensland, Western Australia, Northern Territory and Tasmania all have Criminal Codes.[52] The laws in the common law States are, with the exception of Victoria, virtually uniform and courts generally tend to follow each other's decisions. The Codes of Queensland and Western Australia are almost identical, and the overall effect of the Tasmanian Code is similar,

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52. Queensland Criminal Code Act 1899 (as amended); Western Australian Criminal Code Act 1913 (as amended); Tasmanian Criminal Code Act 1924.

although achieved by a different arrangement and drafting style. The Criminal Code of the Northern Territory, being of relatively recent origin, has a number of significant differences.

43. The similarities in the laws of the five States other than Victoria and the Northern Territory are such that, for the purposes of comparative analysis, an overview of the provisions relating to theft and fraud may be obtained by a collective examination. Victoria and the Northern Territory are considered separately.

(a) Theft and fraud in the Australian States other than Victoria and the Northern Territory

(i) Theft

44. In the common law States the position is similar to that which existed in England prior to the passing of the Larceny Act 1916. The basic offence of larceny remains undefined, and is tied to the idea of a physical taking of the personal goods of another. It remains hedged about with restrictions as to the forms of appropriation and property relevant to the offence, and is supplemented by a series of further common law and statutory offences (such as larceny by mistake, by finding, by trick, obtaining by false pretences etc.) to each of which also attach subtle and complex differences of definition and most of which are largely overlapping.

45. The Code States have sought to overcome the problems of the common law concept of appropriation by providing that theft embraces both a taking and a fraudulent conversion of property.[53]

Property that can be stolen

46. In the common law States, theft is restricted to identifiable, tangible items of property. Choses in action are thus excluded,

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53. Queensland Code, s.391(1); Western Australian Code, s.371(1); Tasmanian Code, s.226(1).

although New South Wales has created a specific offence of stealing a valuable security.[54]

47. The Queensland Code, which is similar to the other Codes, states that "every inanimate thing whatever which is the property of any person, and which is moveable, is capable of being stolen".[55]

The mental element of theft

48. The requisite mental element for the basic theft offences (usually described as "fraudulent") appears broadly similar in both Code and common law States. The Code States define a series of forms of intention sufficient to support a charge of theft: permanently to deprive, or to deal with the property in such a manner that it cannot be returned to the owner in the same condition, to use the property as a pledge or security, or attach conditions as to its return to the victim; further, an intention to use money at one's own will, despite an ultimate intention to repay, also amounts to criminal intention.

49. In Queensland and Western Australia, the term fraudulent has no wider meaning beyond the specified states of mind mentioned in the last paragraph; the issue of whether the term imports any further element of culpability, and how precisely it is to be defined, is still relevant in the common law States, and is examined below in relation to Victoria where judicial attention has been most keenly focused.

(ii) False pretences

50. There is no single general offence of fraud in Australia, but each of the States possesses a statutory offence of obtaining by false

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54. Crimes Act 1900, s.134.

55. Sect. 390.

pretences, the essence of which is that the defendant, with intent to defraud, obtains property from the victim by misrepresentation.

51. Each State has also made statutory provision for a variety of other fraudulent practices such as passing a valueless cheque, obtaining credit by fraud or false pretences (based upon section 13 of the Debtors Act 1869), fraudulent misappropriation or misapplication of entrusted funds, and various other offences dealing with specifically fraudulent acts by company directors, agents and so on. In relation to corporate bodies and public companies, there are fairly extensive statutory offences relating to many areas of company conduct, although none perhaps are quite as sweeping as section 176A of the New South Wales Crimes (Amendment) Act (No.95 of 1979) which provides that it shall be an offence if a member of a company "cheats and defrauds or does or omits to do any act with intent to cheat and defraud... the company, or any person in his dealings with the company." The maximum penalty for this offence is ten years' imprisonment.

52. The Code States also have a misdemeanour of "cheating" e.g. Queensland:

> **Cheating.** Any person who by means of any fraudulent trick or device obtains any other person anything capable of being stolen, or pay or to deliver to any person any money or goods, or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of a misdemeanour.[56]

(iii) Interchangeable verdicts

53. Some of the prosecutorial difficulty caused by the range of slightly overlapping offences (such as the differences between theft and false pretences being based on the issue of whether ownership has

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56. Sect. 429. The maximum penalty is two years' imprisonment.

passed) is mitigated by the provision in all the five States allowing for interchangeable verdicts on charges of larceny, false pretences or cheating.

(b) Victoria

54. Theft and related offences were completely remodelled in Victoria by the Crimes (Theft) Act (Vic) 1973[57], a close copy of the Theft Act 1968. The Victorian law is, however, significantly different from its English counterpart in two respects: the offence relating to obtaining a financial advantage by deception, and the judicial interpretation of the term "dishonesty".

(i) Obtaining a financial advantage by deception

55. Section 82 of the Victorian Act provides that:

> "A person who by any deception dishonestly obtains for himself or another any financial advantage is guilty of a felony..."

The section deliberately left "financial advantage" undefined in view of the problems which had beset the equivalent concept under the English legislation.[58] Matthews v. Fountain[59] goes some way towards establishing more precisely what amounts to a financial advantage. The Supreme Court of Victoria held that a person who knowingly proffers a valueless cheque in purported discharge of an antecedent debt obtains a financial advantage. Gray J. added that however "penniless" a person may be, he derives a financial advantage by evading an extension of time within which to pay.

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57. Now Crimes Act 1958 (Vic), ss.71-96.

58. See para. 3.4, above.

59. [1982] V.R. 1045.

56. Commentators[60] have, however, expressed concern at the resultant potential breadth of the term, arguing that in the absence of statutory guidance, it could be used to extend the criminal law in an unwarranted fashion, and perhaps render the obtaining by deception of any contractual right, or relaxation of any contractual obligation a "financial advantage" within the section. This, it is argued, is an area adequately covered by civil law processes.

(ii) The meaning of "dishonesty"

57. The Victorian law of theft has received remarkably little attention in the courts, except in relation to the element of dishonesty in the offences of obtaining by deception, the effect of which has been to move the law a significant distance from the current English interpretation.

58. The English authorities[61] confirm the partial nature of the definition of dishonesty in section 2 of the Theft Act 1968 (which section 73(2) of the Victorian Act copies); thus, a defendant can escape conviction on the ground that he was not dishonest even though he cannot bring his conduct or belief within the terms of section 2.

59. The majority of the Victorian Court of Criminal Appeal, McInerney J. dissenting, in Salvo[62] rejected this approach. Fullagar J. was strongly of the opinion that dishonesty was to be interpreted and proved by the prosecution as a separate and necessary element of the offence, and as such, was to be given a uniform meaning; it was not to be left to the jury to make of as they thought best, especially in view

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60. Lanham, "Obtaining a Financial Advantage by Deception in Victoria - the Meaning of Financial Advantage",[1977] 1 Crim. L. J. 188 and Elliott, "Obtaining a Financial Advantage by Deception: A Comment",[1978] 2 Crim. L. J. 18.

61. See para. 2.4, above.

62. [1980] V.R. 401.